The Legal Arc

Volume 2 *Issue 1*

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KIRIT P. MEHTA SCHOOL OF LAW

SVKM's NMIMS SCHOOL OF LAW

Publication Committee

THE LEGAL ARC

Editorial Note

Law doesn't abscond; law enlightens and empowers.

For those who need, those who value and even those who not, shall know you all, that law is supreme and above all.

The Publication Committee of NMIMS Kirit P. Mehta School of Law, Mumbai, is elated to present The Legal Arc Volume 2 Issue 1. In this issue, the committee brings you a collection of incisive writings from various significant fields and contemporary issues that affect the world of law.

In addition to interviews with seasoned professionals, this issue features interviews with alumni from KPMSoL. Our alumni, who have carved their careers in various fields of law, shed light on their experience as young law graduates. Apart from that, this issue lends itself to be ablaze in the dark, as depicted by the cover, on various new developments through legal articles, case commentaries, infographics, and recent updates.

The Legal Arc is inspired by the goal to simplify the law and the legal journey for its student readers, and this issue aims to bring fruition to that goal. We sincerely hope that The Legal Arc shows you a new perspective.

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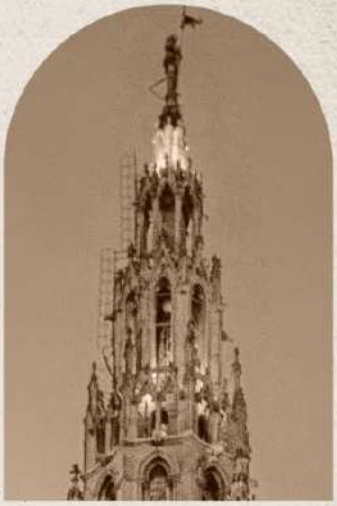
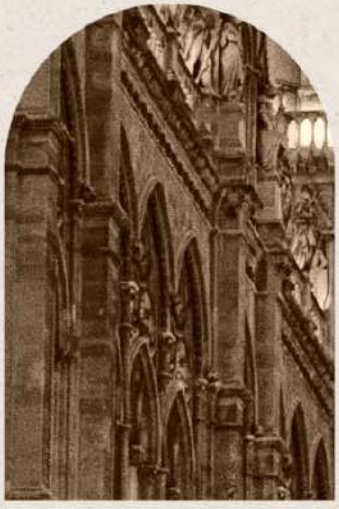




Ipshita Dey, In-house law practice

Interviewed by Ghazal Bhootra

Ipshita is a corporate legal attorney and is one of the best in her field. Rightfully recognized for her expertise in corporate affairs, drafting, and alternate dispute resolution skills, Ipshita has interned for Supreme Court advocates and various legal firms and is currently a legal manager at a U.S. $2.7 billion enterprise Welspun Group.

INTERVIEWER

What intrigued and drove you to follow the profession of corporate law?

IPSHITA DEY

You would have noticed how people are driven and want to idolize *Harvey Specter* and be like him when they enter law school. It was not the same for me since I was never interested in corporate law and law in general. My first brush with lawyers was at an embassy party where the Indian ambassadors I met had initially been lawyers and then went into foreign services. I was sure I wanted to do something of that kind. When I joined law school, I was confident that I wanted to become a lawyer and move to civil services. I also during the course of time, considered joining the judiciary or practicing law. Then in my 3rd or 4th year, I did an internship with this mid-sized but long-established firm called Manilal Kher Ambalal, but work given was very intense and hands-on. This was around 2017 or 2018, when the Insolvency & Bankruptcy Code had just been introduced, and everyone was excited about it. Despite my reluctance, I joined the insolvency team. I realized that there was so much more to corporate law than mere dry transactions, it also deals change in the market and how it drives change in people.

I had a prejudice towards corporate law as a subject, coming from a traditional law school like ILS Pune which has given the country and the world several fantastic litigators and judges. Still, I started getting a drive towards it due to my experience. I started reading about it, why a particular law was introduced, how it will work, and how it is different and then started researching it. I did my diploma in corporate laws from ILS whilst completing my law degree. I found it fun and then took up securities law as an elective and had a fantastic professor who was a practicing C.S., Mr Gaurav Pingle. It was entertaining, and I was inquisitive to find out more about it, and this was basically how it started.

INTERVIEWER

Coming to your conversation about diplomas, you have done two or three diplomas?

IPSHITA DEY

Yes, coming to that, I have done three diplomas in corporate law, media & telecomm laws and cyber laws.

INTERVIEWER

So how have these diplomas helped you in shaping your career in the present?

IPSHITA DEY

Firstly, I did not pick these diplomas thinking how they would look on my C.V. which I have realised a lot of my peers do, I did it because I wanted to know more about them and because I wanted to explore the depth in modern fields and explore if I would want to pick it up for my career. I would like to tell you how they have helped me very early on. They give a perspective on the practicality aspect of law. The course structures were excellent, the best faculty and practitioners coming and interacting with you, you learn a lot. The field contains far more than 150 to 300 pages of your bare legal text. The law today is in place due to the current economic conditions. Then you have these practitioners who tell you about this elementary stuff about strategies, transactions, proceedings. This tells you very minute and crisp details, which leads to perfection of your end goals like: if the transaction has gone through, is the matter solved, and if you close a specific deal.

This is why I would suggest that when you choose a diploma, choose it not because it adds to your resumé but because it makes you more interested in a particular field. And the most important thing about getting a good diploma is having a good faculty, good practitioners, and a good course structure. I have seen so many courses which have come up online which I would implore everyone to take, keeping in mind that it does not only add to your C.V. but also your interest. It would not be as significant as a degree. Still, it would give an excellent impression to your employer that you care about your academic education and are willing to go beyond what is mandatory. Finally, my advice would be to pick a good course, do a little bit of research about it and learn more.

INTERVIEWER

This is an excellent piece of advice because I have not seen lawyers advising us to do a diploma or to do a particular course of such kind.

IPSHITA DEY

No, when the lawyers would tell you not to do a diploma, they would mainly mean that it's just a piece of paper that would not decide anything. I would agree that it has to make you more interested and helps you learn something rather than just doing it for its sake. So yes, quality over quantity, in my opinion.

INTERVIEWER

What advice would you give to students who would be looking to go into being an in-house legal counsel in terms of their C.V., Resume, or skill-building?

IPSHITA DEY

So, I believe that the primary difference between a law firm, associate, and in-house counsel is that you will always be in a specific team in a law firm. If you have been assigned work with different groups, you will be working for a particular field. When you become a special counsel in that specific field, the level of expertise will be excellent but you might be limited to only that field. For example, if you are a fantastic Funds expert lawyer, you may not know much about labour law or I.P. law. This is what you will experience when you join a firm as an associate instead of an in-house counsel. But as an in-house counsel, you will be dealing with everything, including your labour laws, H.R., banking and finance, and making resolutions, securities, corporate transactions like M&A, etc. You get a commercial perspective because you are invested in a business since now you know what you are doing and why you are doing it in a certain way. For example, today, I want to bid for this particular company or acquire it, so as a firm associate client wants me to do that duly, so I am going to draft a SPA or an SHA as opposed to an in-house lawyer you will know why you are investing there, the market scenario will be apparent to you then the reaction of your shareholders, promoters and how they would admire it. Those who know off the bat what they want to specialise in, firstly well done to them because they are focused and know what particular field they want and, in the end, they would come out as an expert in that field and have experienced no one else has as opposed to those who are exploring, they should work as a general counsel to understand more about this field. This is the primary difference between these two and works culture is the same then you have fantastic law firm teams, pathetic law firm teams, good in-house roles, and pathetic in-house roles where you will get more of client-related work and not the job you want and a type of work where you will not need to apply your mind. Still, I would tell you that it is not much different when you start working because the deadlines are the same at the end of the day. You are still networking and socializing with the same set of people who are your colleagues and peers, and everyone respects each other. It could be toxic; empowering all this depends on the management is what I think is a difference, but the work is different from the work culture.

INTERVIEWER

Also, the second part of the question was how students should hone their legal skills or skill-building or resumes in terms of in-house instead of law firms?

IPSHITA DEY

I have seen that an in-house team wants a different variety of things. Still, according to my experience, if you are a well-rounded

person, you will go far more ahead than narrowing yourself down to these specific things. My advice to anyone deciding to pursue law as a subject and then have a career in it would be to do everything - moots debates, publications. And if you are thinking that some articles and research papers are intimidating and that you may not get published, then start writing your own blog. Because at the end of the day, it is sharing your knowledge with the world and learning more in that process. Also, do a lot of extra-curriculars like drama, dance, music, etc, and do not limit yourselves to only academics. Whatever is your heart's desire, go out and be a well-rounded person. This helps you know that you have an inclination towards something and then start reading more about that activity or improvise your skills in that particular activity and try to do everything possible you can do.

When we are interviewing freshers, we are looking for people who have an appetite for learning. For someone coming to the field completely green, I don't expect you to have experience because that is contrary to reality. But I do hope you have an appetite for learning to want and to do better and brilliantly. This goes a long way ahead, showcasing that you want to do different things and telling you that you have done so many other things. But do some courses, moots, and publications. And if there is something you shine at, definitely pursue that and put that in your C.V., for example, if you think you are good at social work, do that and put it in your C.V. These are tiny things which catch someone's eyes when we look at a C.V. because we are always looking for someone who is not a part of a crowd and is something more.

INTERVIEWER

In your opinion, is it possible to use e-consultation facilities to expedite policy decisions on corporate law?

IPSHITA DEY

It is an excellent move on the part of our legislators. I feel many people would get restricted from sending out their suggestions and recommendations to laws and regulations that the government and regulators put out before, when it was physically based. Now this has become much easier to share, less time-consuming, and because it's in digital or electronic form and is far easier to collate, research, and conclude on this data for the government. Electronic communication has boomed in these last two years because we understand the importance and potential of electronic communication.

INTERVIEWER

Have you experienced a case that made you re-evaluate your thinking or perspective?

IPSHITA DEY

I will be frank with you. I think every case makes you re-evaluate your perspective.

For example, with dispute resolution, when you leave law school, you have a particular perspective. I want to win this. I have this particular point, and yeah, this might take six months more, but ultimately, it's about winning the case at any cost. While working and while litigating certain matters, I realized that it is not always about winning but ultimately getting what your client wants or, per se, in this case, what my management wants. It may not be to win the case; it may be to cut down the losses, expedite the matter, retain a relationship and quickly settle and resolve a dispute. I am telling this from a dispute resolution point of view, but every case or transaction comes with its challenges and perspective and adds value to how you view the problem and ultimately what your solution will be. There was this one arbitration I had worked on: a provisional application we were making to the High Court. We thought that we had a pretty good case and argued before the bench for 4 days straight . I thought that this was definitely in the bag, there's no way the order can come in the opposite party's favour. And yet, we did not get the relief we wanted. However, even in this loss, it was interesting to note how the opposite parties argued the matter, and why although the same advocate represented these opposite parties, one party took a certain stand and the other did not, how the judge had ultimately drafted the order and the little nuances that we could only realise in retrospect. It was a very recent experience. Sometimes when you feel you have all the cards in your favour, things might turn out it's not. You cannot be 100 percent fully prepared for these things, and the best you can do is learn from them. I think every matter opens your eyes up, and you might feel a certain way while you're doing it, but retrospectively you are most likely going to feel differently about every matter you get.

INTERVIEWER

According to the changing trends in the corporate world, which specialization do you think has the most scope today?

IPSHITA DEY

This is a fascinating question. I would say that there is no such specialization that has the best or maximum scope and I will tell you why. You have to define your goals. When you enter into the field without thinking only about how much scope there is but without knowing whether or not you're really interest in it, you will only do so much. Try instead researching about the subject matter and field of law itself, find out which field and what about it interests you, knowing what you want to do and where you want to be. You will fulfil your goals and reach a point of success regardless of what the industry says, or what the newspapers say. For example,

even in corporate laws also for that matter, there are many specializations – M&A, capital markets, competition law, insolvency law, etc.

The importance of a certain field of law is subject to change and so will the scope of the said profession. The market, economic situation, and structure are all going to be changing- this is not stagnant, it's actually very dynamic. To answer your question, I don't think there is any one particular subject that has most scope.

INTERVIEWER

Circling back to our original discussion about how the corporate field keeps on changing, there are new updates every day. So how do you keep up with it, and how do you keep up with so many things coming at you?

IPSHITA DEY

To be honest with you, you will not at all times be able to keep up with everything happening – it is not humanly possible. If you try to keep up with everything, you will end up overwhelming yourself I can tell you what I do though. I usually browse PRS India once a week. They publish all the bills and the acts in one consolidated page as they become available. It also tells you about the various notifications about what the government has brought about and the specific rules they are introducing. I would suggest going and taking a look at that because sometimes you may know what is happening before it takes effect and that gives you an edge.

The second thing I do is read the plain bare text of law first. Because nothing will give you more perspective than that will. It'll help you critically analyse that the content and the context and perhaps even predict the effect of the law. After this, there are firm newsletters, articles, research papers on that particular subject or on that act or bill or amendment. These can help you see how your views are different from the next person of that field and eventually how the Courts interprets that. One of my favourite newsletters is from Nishith Desai. Their research articles and research papers happen to be quite exhaustive and in-depth, and they cover almost everything. You can keep a track of their website. You can also subscribe to firm's newsletters, and you will keep getting regular articles. It's how I go about it though everyone has their methods.

INTERVIEWER

Do you have any parting advice to give to our students?

IPSHITA DEY

I understand that because of attending law school remotely and online, the experience is not exactly the same, but try doing as much as you can and learning more about different aspects and career roles. If you are interested in ADR - mediation as a practise will pick up

soon, arbitration has already picked up. Try looking into becoming members of various institutes like MCIA that is Mumbai Centre for International Arbitration which has its peer group called Young MCIA, where they host a lot of events for young students and practitioner like ourselves to learn more about the field. Go ahead, do more courses, do moots, debates, extra-curriculars and learn more; figure out what you want to do, and I am 100 percent sure you will figure out how to get to where you want to be as soon as you figure out what you want to do. And do not be afraid of exploring, trust me it's never too late to start or pick up something.

Samarth Jaidev, Master of Laws (LLM)

Interviewed by Ghazal Bhootra

An alumnus from our very own college, he is a talented individual who complements his work through sheer handwork and dedication. After spending a year in service to the Supreme Court of India, he is now pursuing his LLM from the prestigious King's College in London.

INTERVIEWER

Could you give a brief introduction of yourself?

SAMARTH JAIDEV

Hi, I am Samarth Jaidev from the NMIMS batch of 2020. After graduating, I worked as a Judicial Law Clerk with Justice Ramasubramanian in the Supreme Court of India. Since completing that, I've joined the Dickson Poon School of Law for my Masters. My pathway of choice leans towards intellectual property rights law.

INTERVIEWER

What experiences during your five years of law school have been important for your career?

SAMARTH JAIDEV

I would say that the most crucial skill I've learned from law school is grafting, and not academic grafting, grafting to make a system work in our college. I often consider that our batch and the senior batches functioned well together to get things going in our college. With utmost respect to the authorities, it was something that they were figuring out with us too. The process of understanding how to make things work as a college with the university that NMIMS is; was something that I learned and figured out. You have to be able to graft, adapt, and be confident enough to think on your feet. The camaraderie that we shared with our batch and the seniors helped me learn a lot about grafting, sheer determination, and to not think about something's negative consequences before it has even been done. Sheer will, determination, and graft; NMIMS will give that to you in plenty, which helps you get comfortable with tougher circumstances that you'll face in the future, during your career.

INTERVIEWER

What made you choose judicial clerkship as a career option?

SAMARTH JAIDEV

I've always been a person who has been interested in court litigation. I have a family background in the same. From the very start, I knew I wanted to do court practice, and my first internship was with a Judge at the Bombay High Court. To begin with, it was an eye-opening experience as I was clueless and didn't have any prior experience. From that

internship, I learned to view things from a neutral perspective, and to critically analyse the same, which really come in handy in your career. My final internship assignment was to write a judgment in full, which I believe was a great experience. It was nerve-wracking, but my Senior appreciated the end result.

This experience piqued my interest in court litigation. After that, I got into the rut of working part-time with college and I got to do that with lawyers and firms. I had always wanted an opportunity to work with a Judge again. So, when one of my seniors told me about this opportunity, I jumped right at it. With the pandemic, doing a Masters then wouldn't have made sense anyway. If you stay close to a Judge, you get to think from their perspective. Today, when I see a criminal brief, I know a few things a judge would want for me to get his attention or to come to a common consensus while presenting an argument. In the Supreme Court, where you are only afforded little time on a miscellaneous day, you need to know exactly what to say. One-on-one experience to be told what you are required to say or not say was a hard, but priceless exercise. The idea behind doing a clerkship was to better myself as a lawyer, and I've certainly come far from what I was in college and when I left.

INTERVIEWER

How far has your internship played a role in shaping you, and could you share your most important internship experience?

SAMARTH JAIDEV

I adored the life of GLC students, who had the flexibility to work with college, but I did not like the fact that they lacked giving proper attention to the academic courses in college, and I wanted to balance both. With an institution like NMIMS, the academic standards are much higher. I would also like to specifically thank my faculty, who guided me through all my doubts and concerns to strike a balance through my academic and professional pursuits.

As a counsel practice aspirant, I enjoyed my internships under Mr. Rohaan Cama, Dr. Abhinav Chandrachud and Mr. Shyam Divan. They have been mentors to me and getting a chance to watch them closely upfront was priceless.

Throughout my college life, I was busy interning, which a lot of people find very hectic and a little too much, but I would say that it was very rewarding, and with the cutthroat situation in cities like Mumbai and Delhi, you need to be that prepared.

INTERVIEWER

Do you believe that it is necessary to gain some work experience before pursuing L.L.M.?

SAMARTH JAIDEV

Frankly, I've always thought that working through college would save me that time, and I would not have to go through that phase of confusion. I would still go with the idea that if you have clarity and are a headstrong

person, having a lot of work experience is not going to change your drive to pursue further education. If you have decided on an LLM and you believe you have the relevant experience for the same through your internships, you do not need to hesitate pursuing it immediately after graduation. I have also noticed that once you're in this professional rut, you become comfortable in the life and lifestyle. To leave all of that and then pursue further education is not an easy choice.

I would like to quote one of my seniors here, "Out of sight is out of mind." Once you are there and you disappear for a year or two, it is not like there is a shortage of lawyers in the country, both on the corporate and the litigation side. If you are not there, there is going to be a second Samarth Jaidev, a second someone who is willing to jump on and make a mark. No one is going to be benevolent and sweet enough to wait till you've completed your masters and come back. It does not work that way. This was my thinking. So, it worked for me since I was working in Delhi and gaining experience first-hand while not losing anything in Mumbai. The people with whom I had familiarised myself knew my plan all along. Delhi followed by Masters and then returning to work worked out for me.

INTERVIEWER

What experiences or internships have played a role in your admission for higher education, and what advice would you like to give your juniors who wish to score such admissions?

SAMARTH JAIDEV

For the first part of the question, my mentors Mr Shyam Divan and Rohaan Cama (whom I modelled myself upon and who was also an alumnus there) and Dr Abhinav Chandrachud, played a great role. I have a history; my Uncle was also a King's college graduate from its 1989 batch. For me, it has been something that I have deeply wanted since my childhood. It was a dream, and I was clear about it. In courts, you will find people completely anti-LLM people because they do not see the financial quotient making sense, and then you will find people who are strong advocates of getting the experience and developing flair. I have been lucky to have had Seniors who encouraged me to pursue my dream.

I am grateful to have had Seniors who wrote my references themselves, rather than relying on generic drafts. I was lucky in terms of getting support from my family, bosses, and the faculty at the college. All of them constituted strong support for me to be clear with my plans for the future.

If you want to go to the United States, the colleges there are very liberal. You need to have a balanced profile with equal proportions of academic and extra-curricular interests. You will be shocked to know how many Tier-1 colleges consider your applications there because they don't base

you entirely on academics. USA has some of the best colleges in the world. But, for me, it would not have been financially viable and was not an option I could pursue despite my interests.

If you are looking at the United Kingdom, bluntly, what matters is your academics. While professional experiences do add weight to an application, it cannot stand if the relevant grades aren't there to support it. Based on your grades, you will have an idea of the expected college that you can get into. Colleges in England also pay attention to publications and papers you worked on. If that is the case, they might offset some of the grade requirements per se, but otherwise, you need to be a person with good grades, and that is what makes your profile. A tip from my end would be to work with an NGO, which would be a value addition in terms of community service, thus enhancing your chances. In your SOPs, writing a little bit about your social service experience goes a long way, as it enables them to look at you in a different light, as compared to just another person having a mark-sheet.

Other places like Europe more liberal in comparison to the UK. Singapore and Australia are great options too. So, my last piece of advice to you would be in terms of your masters: Know how much you are willing to pay, if your budget is more, and if you are willing to consider a job in the US, which (believe it or not) is a bit welcoming in terms of providing jobs.

What is crucial for you to know is your budget, subject, area, and whether you want to return to India or stay abroad. It is critical to know which college is good for which course as each college has its own flagship courses and modules. If you are someone who wants to pursue higher studies abroad, I would suggest that you start the admission process towards the end of your fourth year and be in a place to finish your IELTS by July or August because most of the colleges open up their process of accepting admissions from October-mid and have a rolling-basis admission system. Thus, the earlier you apply, the greater are your chances because of the higher number of openings. Apply earlier and your chances of getting in could be better. There are also certain scholarships programs that you could have a chance at if you apply earlier.

That is why I believe that starting at the end of your fourth year and thinking about it then is better. Your SOP will need time, and when you compare your first SOP to your most recent one, you will realise that your first application is not as good, but you will not know until you take the chance and apply. The entire process of knowing that you're going to a foreign country, studying something different, and coming back with that tag is thoroughly exciting.

If any student in NMIMS ever wants to reach out to me regarding the same, feel free to do so. I consider it as my responsibility towards NMIMS and my juniors. Having been through it for two years, I can say that I have a fairly good amount of knowledge to help my juniors with their college applications and other such on paper and off paper requirements to get into colleges. I'll share my email address so that you all can reach out to me with your doubts and queries. Not just for that, if you ever need help with litigation or court practice, you can mail me, and I'll be happy to help you with it.

Email ID: samarthjaidev97@gmail.com

Clarissa D'Lima, Real Estate Practice

Interviewed by Ghazal Bhootra

Clarissa, alumni of Kirit P. Mehta School of Law, is an associate at Fox Mandal. Her specialisation lies in Real Estate. She has also previously held the position of Editor-in-chief of the Publication Committee.

INTERVIEWER

Please tell us about yourself.

CLARISSA D'LIMA

I am a 2021 batch graduate of KPMSoL. I joined NMIMS in 2016, and at that time, the college was new. Law school itself was a very new concept to me. But I think I just had a wonderful bunch of friends around and wonderful faculty who were always there to guide me. The five years with friends, faculty, and the learning I have had, have all built me into what I am now. With regard to my career path, somewhere in the fourth year, I gained an interest in real estate, and then a couple of internships in real estate worked out for me. Currently, I am an Associate with the Real Estate Team of Fox Mandal and Associates.

INTERVIEWER

Considering your past experience, how did you gravitate towards internships in the real estate area? Why did you choose real estate?

CLARISSA D'LIMA

So, till the third year of law school, our college itself had a pattern wherein every year we would have to intern with a stipulated type of institution. For instance, in the first year the mandate was to do an NGO internship, thus, my first year went completely for NGO internships. Then from the second to the third year, I took up internships in litigation and my third internship in litigation was in real estate litigation. This was in the second semester of my third year. Then, I got the opportunity to intern with CAM (Cyril Amarchand Mangaldas) in the first semester of my fourth year. As you know, at CAM, everyone's first option is likely to be corporate law. But because of the impression of my preceding internship, I wanted to explore real estate on the transactional side. So, at CAM, I gave real estate as my first preference and it worked out because, in CAM, you might not always get as per your preference. Moving forward, I got my internship and I did really well. That is when I realized that real estate was the practice area I wanted to go forward with. One more reason for this is because I never had a commerce background as I had taken Arts in higher secondary as well. Therefore, my only area of interest was in the social sector, but litigation was not a viable option for me as a first-gen lawyer. I wanted something which could balance out not going

for corporate and wanting to go for litigation. Another factor was that I also liked the kind of work it had. So, that is just how it worked out after my internship at CAM.

Then, I tried applying for other internships in real estate to make sure that this was actually something I wanted to go for and not just a momentary fascination, and I got an opportunity to intern with Hariani in May 2020, but due to the lockdown, I missed out on that. Later in May 2020, we had a virtual webinar conducted by the current Practice Head of Real Estate of Fox Mandal and Associates, which was conducted by the Placement Cell. There, I just asked a random question to clear a doubt and that became instrumental in getting an internship with the Real Estate Team of Fox Mandal. Thereafter I interned with the Real Estate team for about five months in between July 2020-Februaruy 2021 (with a break in between). This internship was a virtual one but everything worked itself out!

INTERVIEWER

What, according to you, are some qualities or skills that enable a first-generation lawyer or law student to get into a top firm as you did?

CLARISSA D'LIMA

I think as a first-generation lawyer, the most important thing you need to understand is research, as you do not have the privilege of having law being discussed at your dinner table every day. It is not like you know how it works on the practical side. What you need to do is read books and do research online. If you learn how to navigate through that and research, it will help you to a large extent. This is because if you join a firm as an intern or a trainee, your seniors would not have the time to go and check out cases and see what fits where. You should be able to grasp what the matter is and what kind of cases you can bring out. You should be able to do the same even in terms of laws, as there are numerous statutes and no one knows all of them. Even if you are able to bring out which statutes and policies apply to a particular matter, that will help a lot.

For research, one of the things you will also need to do is paying attention to lectures in class. Many will not be paying attention because it is theory based learning. But you never know when the theory taught will come to your aid. Listening in class is something you can do very easily, so make up your mind to do it. Your faculty has gained a level of experience and when they give you anecdotes of what they have learned, it helps. For example, the faculty gives an illustration in class and two years down the line, if one gets a research query on a similar issue, then at that point, if what the faculty said clicks, it is much easier for you to understand what to search on. If a particular case or a landmark case has been discussed in class, one may also

connect that to the matter at hand. Doing research and being attentive is something that you have at your disposal and you can make good use of it.

Thirdly, if you are good at your networking skills, that also helps. I think after the pandemic, you have platforms like LinkedIn that have become more popular and help you with this, but you need to be cautious about whom you are going to connect with and how you interact with them. Networking is not everyone's cup of tea. Some might be good at interactions, and some might not be. But that being said, research and being in class is something that is always there with you. These are things that you can work around with.

INTERVIEWER

So, what do you think made your resume particularly stand out, like in terms of your internships or whatever you did in your extracurricular, co-curricular activities? What was the highlight?

CLARISSA D'LIMA

In my case, my resume did not help a lot because what my mentor saw was my interest and keenness in real estate. So having a real estate engagement helped me out. I think that is one thing firms will also look out for. If you have an internship experience towards your fourth/fifth year in a particular area, that helps a lot. Secondly, the top firms, will also see your marks. So, no matter how much you say that marks do not matter or that marks are just a sheet of paper (though at times, that might be the case), recruiters they will consider your marks. If not your marks, then they will see how your mooting is. My moot experience has not been great and there is not much to it. But if you are good at moots and have gone for international moots, that helps out.

So, marks, moots, and also your research papers. If you have published in a good journal, especially an NLU journal, that helps a lot. These three things should be a part of your resume. It might be the case that one thing is more and other thing is less. In my case, grades were comparatively good but there is not much on mooting and publications. Everything might not be there, but make sure that there is one area that you are good at, which shows up and stands out. You can work this one thing to your advantage.

INTERVIEWER

What are the lessons you think your juniors looking to enter the field of real estate should know? What are your experiences that they can learn from?

CLARISSA D'LIMA

This will take me back to my previous answer again. Firstly, pay attention in class because your first connection with real estate, if you do not have the chance to intern with a real estate firm, is going to be your lectures on land law. Ninety percent of the students will find land law to be a boring subject. In my case, out of the forty-eight students in my class, hardly five of us had the interest to learn the subject. If you want to go for real estate, I would suggest pay attention in land law lectures and do not go with the herd that thinks it is a boring subject. At least give it a try and explore the subject. You have a course of, say, four months. At least try it for one and a half month and see how it goes for you. If you feel like you have no interest in the end, then you can walk out. Secondly, try it out through an internship. These are the two main points.

Then there is one more point if you are really interested in real estate. There is a lot of scope under RERA [Real Estate (Regulation and Development) Act, 2016] now. As you know, RERA has come out quite recently and has made the process of dispute resolution faster for home buyers. There is a lot of scope for real estate litigation in this area. You can also try it out in combination with litigation and real estate both. You will have that leeway where you can also do more of real estate compared to other litigation matters. RERA is an excellent area to read up on. Since it is a new law, cases are still coming up. If you keep track of it, it will considerably help you in your internship interviews in real estate practice as well.

INTERVIEWER

The real estate sector is probably one of the areas that have been very gravely affected by the pandemic. So, did you see any representation of that in the legal aspect? How was it through the pandemic?

CLARISSA D'LIMA

So far what I have come across is that builders are very cautious with what clauses go into a contract, particularly on ensuring that change in laws and policies on account of a situation like pandemic should not count in the period of their default towards completion of a project. Not just builders but also for companies investing in commercial projects, industrial or even residential projects. Across all sub-sectors, one point of caution is that the Client's interests are secured in case of a situation like a pandemic. All kinds of indemnities and termination clauses are given closer attention to take care of the pandemic aspect. That is one thing I have seen. Secondly, I have seen it affect rent because, as you know, it has been a very long lockdown, and it has caused many landlords to lose out on their chance to get their rent. That is something to take care of, but it

should be a safeguard that is built into the contract itself. I think one of the major changes that have come, for me, is that people are paying more attention to these areas for the first time. The main thing to remember is how you safeguard your interests through contracts. Right now, during this period of lockdown, the correct type of clause is not there, so there is not much to contest. On the litigation side, things have been rather calm. There is not much happening there till now. However, once clauses are open, you might have numerous cases coming up and a new distance coming in. That is a thing to watch out for but, again, it is based mainly on the contract's safeguards.

Sampurna Kanungo, Corporate Law

Interviewed by Kshitij Kasi Viswanath

An alumna from our very own college, she was included in the Dean's merit list for ranking second overall in the BA LLB (Hons.) Program. She has also represented our college in various debate competitions and was also the Head of the Law Review Committee last year. She is now working for Cyril Amarchand Mangaldas as an associate.

INTERVIEWER

What are the advantages and disadvantages of working in a law firm, according to you?

SAMPURNA KANUNGO

Advantages-disadvantages vis a vis some other career, such as an in-house counsel?

INTERVIEWER

Inhouse Counsel, or let us say an NGO, or research, etc. What is the benefit of working in a law firm?

SAMPURNA KANUNGO

I will dive into the advantages first. I was very sure I wanted to practice law in a law firm primarily because of the quality of work that you get. So, say, in an in-house role, since your client will be one, you will be handling all of the matters in relation to that particular client. The diversity and variety of issues you get exposed to in a law firm environment are far greater. So, for instance, if I am staffed on four matters; all four are vastly different from each other, even though all fall within the same practice area bucket. That is one.

The second one is with respect to the growth potential. I think there is a lot more scope for growth in a law firm environment, primarily because of the nature of matters you are exposed to. And secondly, I felt like in an in-house counsel role, the quality of work, and the issues you ultimately assist on, are very limited. And at advanced stages, they go over to the law firms for assistance, so on a day-to-day basis, I find that the work in a law firm will be much more diverse and interesting as opposed to compliance-related or contract management-related roles.

Of course, I do not have a lot of, or even any, experience in the in-house role. So, this is mainly based on my perception of it and my interactions with people. But while making that call, these are the jumping points where I went off of.

When it comes to the disadvantages, I am sure it is no secret that the hours are especially bad. I think that is something that everyone should be very wary of. I have recently experienced, from my interaction with friends and so on, that the hours are not just bad for larger firms or tier one firms; the hours are uniformly bad throughout the industry. I wish somebody had sat me down and explained all of this to me in my earlier years. Initially, when you hear these horror

stories, you think that these are one-off incidents, or these are not as prevalent, but that is not the case. That is not to say that you will be working for 16 hours at a stretch. But the hours can get very unpredictable, and the hours can be long depending on the transaction stage. The concept of holidays and weekends is diminished once you start working, depending on what work comes up, whether it is urgent or not, if the timeline is stringent on a matter, you are going to have to pick that up. That is a major disadvantage. Apart from that, tight deadlines, fast-paced work, and not being able to take your own time for everything. At the same time, that also comes with a lot of learning in its own way and a lot of variety.

INTERVIEWER

Just to summarise, the advantages are greater learning opportunities when we come to law firms and the scope for a diverse number of matters which you can make yourself adept with whereas the disadvantages are the rigidity of hours and the lack of a personal life.

SAMPURNA KANUNGO

…And a very fast-paced environment.

INTERVIEWER

What was your journey to secure this role at CAM?

SAMPURNA KANUNGO

With respect to Cyril Amarchand and Mangaldas, my journey was relatively easier than a lot of the others, in the sense that I interned with CAM in my 4th year, and right after my first internship, I was asked to sit for a PPO interview. I was offered a PPO post this interview. After that, I was barred from interning anywhere else for a year and a half till I graduated. I joined Cyril Amarchand and Mangaldas upon graduation. I think for a lot of the others, there are two or three ways to go about it: one, the more common one, is you get an internship, and then get a call back internship, or an assessment internship post that. During the internship, if your team deems fit, you get offered a PPO.

The second is if you intern long term and eventually get absorbed by the firm and continue working, you switch from an intern to an associate. The third is, you apply directly for an interview with the firm after you have graduated. Depending on the firm, they will either ask you to intern for a month, assess you, and offer you a job; or they will simply offer a job to you based on the interview. In that case, the interview is going to be a little more stringent than a PPO interview. I would like to point out right now that this varies greatly, from firm to firm. If you are interested in a particular firm, I suggest you speak to somebody and figure out their hiring process first. For instance, a lot of the firms will not offer a call-back internship. It is a do-or-die situation in the first instance itself, so if you do not get an offer the first time around, it means you are out of the process; you are not going to get a

call back or a job offer later on. Some firms hire specifically from their intern pool, so it becomes necessary for you to intern with the firm; you cannot directly sit for a placement interview. Some of the others require you to intern long term at the firm, say six months or more, and only then will they decide whether to give you an offer. So, make sure you do not go in blind, speak to people working at the firms, and talk about their hiring practice. A lot of the firms also have certain limitations because they will only hire for a particular year, during a specific period. For instance, for the year 2021, they will finish hiring on campus in 2019. In which case, you need to make sure you have interned at the firm and you have secured an assessment internship before that cut-off period. It is not very strict, but some firms will follow that. Make sure you are aware of the hiring practice and the process they follow before you go into an internship, and obviously, this is for the latter stages when you are looking for a job.

INTERVIEWER

What were some of the defining experiences or habits that you adapted or inculcated to secure such an offer with CAM?

SAMPURNA KANUNGO

I would say during the internship. put in your 100% for every task that is given. Once you start working or interning, you will find that there will be key moments where you can highlight certain skills, which will matter in the end. There are two basic skill sets that you need to hone during your time at law school, everything else you can pick up later- one is research, and the second is attention to detail. I say attention to detail because in your initial few years, be it as an intern or as a first second-year associate, you are not going to be given a lot of heavy lifting to do. It is going to be a lot of mundane tasks. One of the ways you can stand out and set yourself apart is with respect to how well you perform an assigned task. Even if it is something as simple as proofreading a document, if you have a sharp eye and can pick up on things that others might miss, that is something that your seniors will appreciate. Again, that takes the load off of them because they do not have to go back and review your work and put in more work for something you should have done. That becomes a crucial skill set.

Another thing I do not think is commonplace but should be is being vocal about what you are expecting out of an internship. In the 4th or 5th year, it is an expectation that you are interning because you want a job. However, it is better for you to communicate this clearly with your team, preferably once you have established a rapport with them, maybe towards the end of your internship. Do not sit back and expect that you will receive that call for a PPO or an offer or a call back; make sure that you speak to your partner and speak to the senior members of the team. If you have that kind of rapport, you can ask them

to push for it, but make sure you communicate this clearly with your team. It also gives you a better sense of where you stand and whether you should go out looking for other places or if you should pin your hopes on this one opportunity. So that is something that is very, very important.

INTERVIEWER

In your initial years at law school, or at your time in law school, what extracurricular activities were you passionate about? And how have these extracurricular activities moulded you towards having the career that you are trying to make right now?

SAMPURNA KANUNGO

For me, there were two activities that I engaged with quite consistently at law school. One was debating, and the other was publications, writing, editing, law review- basically research, and publication. When it comes to debating, I would say that a large part of my time in law school was invested in this activity and I think it has helped me immensely. One, it has helped me in the conventional sense of improving articulation, improving confidence, and being able to present my ideas in a coherent manner, not just while speaking; this also ties into the second point, with respect to how you frame arguments. The ability to frame arguments and think on your feet that debating, as an activity, lends you. That is something that I found; it pervades into all the other activities I engaged with at law school. My experience with debating helped me in mooting as well. For instance, while mooting, I found that towards the end during rebuttals, I would end up debating with the judge, and I would speak in that manner, and that ability to think on my feet helped me with answering any questions they might have for me. The skills of being able to frame arguments and think critically about issues are what helped me in my other activities as well, which were writing and publication. Because at the end of the day, when you are writing an article or a research paper, it is nothing but putting forth your research into an original idea and presenting that idea in a structured, coherent manner. If you can think along those lines, you will be able to put those ideas on paper as well. I would say all of these activities were very interconnected and they kind of merged to be able to help each other out and help me in the pursuit of them all. It also gives you the confidence of knowing that you are going to be able to deal with the proposition at hand or knowing that you are going to be able to present your ideas in a coherent manner because you have done it so many times before. A lot of the time, that confidence in yourself also becomes crucial. Especially so when you are dealing with uncharted territory.

INTERVIEWER

What were some of the factors that made you realise that commercial law was one of your key areas of interest?

SAMPURNA KANUNGO

One would be interning in those areas. I followed a method of elimination. I interned with a lot of family lawyers, and I knew that was not something that I wanted to do, same with criminal litigation, same with civil litigation. The process of elimination was the first factor in helping me understand that maybe commercial law is something that I should at least try out, if not focus on. The second thing would be to realise the kind of matters that interest me. In one of my internships, I realised that if a matter is very technical (this is something I noticed while observing oral arguments in court), it interests me far more than something that is, say, more fluid, like a Constitutional case. That was the first point, and knowing myself, I know that I am probably better suited towards; a) understanding technical matters and; b) being able to argue or work in matters that are more commercial or technical in nature. While I love the constitution and other allied fields, I know that as a career option, from a long-term perspective, something that is commercial in nature will interest me more. The third factor was the subjects I started taking towards my third year, which is where your commercial law subjects begin to come in, and those were the subjects that interested me a lot more. That helped me solidify that Commercial Law is going to be a practice area that I am interested in and that I am looking at in terms of a long-term career.

INTERVIEWER

What is a typical day for an associate in a top-tier law firm in India?

SAMPURNA KANUNGO

My experience is going to vary a lot from others, even within my firm. But from what I have seen, the hours for me are going to be very unpredictable. I could have the entire morning off and then suddenly get bombarded with work towards the end of the day depending on what is happening. This happens because a lot of the work that you are doing also depends on inputs from your seniors, clients, or even the other side. All of these factors merge to give you a very unpredictable working day. So, that is one. The second thing I would say is that the kind of matters you will be working on will also vary. So, at any time, it is not like you are working on a single matter. You are going to be working on multiple matters at the same time. Having to manage all of that and prioritising all the matters is also something that you need to slowly learn. Just to summarise, the top two things of note would be that your hours are going to be very unpredictable, especially at a junior level, because they are contingent on a lot of other factors and work done by others; and that there is a multiplicity of matters that you are going to be working on at any given point in time.

Vaishnavi Gupta, Business Law

Interviewed by Kshitij Kasi Viswanath

Alumni from our very own college, she works as an associate at Khaitan & Co. She finished her degree with a specialization in banking, finance, corporate, and securities law.

INTERVIEWER

What inspired you to take up law and continue it with the rigour you are currently working with Khaitan?

VAISHNAVI GUPTA

I have to disappoint you. I never thought of being a lawyer until 2015. I never considered law as a glamorous profession like it portrayed in the TV series. My only "dream job," if you all believe in, was a 9-5 job, and that I thought that becoming an engineer would guarantee me. So, like all other typical 'baniya' families, my father enrolled me in an engineering coaching institute, daily motivating me to clear IIT. Little we knew that destiny had something very different planned for me. It is rightly said that sometimes it is better to end something and start something new than to imprison yourself in hoping for what you are not destined to. So, I moved ahead and enrolled myself in a law school, hoping and wishing to finally fall in love with this field. While I am a first-generation lawyer and come from a very simple family today, my career has been dotted with many happy coincidences, helpful mentors, and colleagues. I cannot credit all of this hard work and perseverance alone. Some people chose to believe in me and support me. Over the five years of law school, I was always drawn towards business laws since the beginning. What was left for me to realize was what in Business Law, so five years helped me realize that Capital markets drive me, and I am continuing my zeal to date.

INTERVIEWER

What are some of the curricular, co-curricular, or extra-curricular activities which have helped you in the career of law today?

VAISHNAVI GUPTA

The first few years of law school are spent learning the fundamentals of the law, such as contract law, criminal law, and property law. The goal of the first few years is for every law student to understand the areas of the direction in which they will be expected to practice. Later, courses in intellectual property, business law, constitutional law, and other subjects are taken to understand the depth and breadth of knowledge that a lawyer is expected to possess. Every law student's experience is unique, and your areas of interest may change as you progress through the years. Many law schools provide opportunities for students to write research

papers and give presentations. I appreciated the opportunity to conduct research and write an essay on a specific topic.

Furthermore, law schools frequently allow students to form groups and compete in moot court competitions. This entail arguing in front of a judge to hone one's oral advocacy skills. Keeping your cool in front of a judge (often an expert in the field) can be a gratifying experience. Furthermore, these competitions, as well as the experience of traveling to a different location, allow you to bond with your teammates and form some long-lasting friendships. All of this is not to say that law school is always smooth sailing. Because law subjects are difficult and time-consuming to master, there is often a lack of time to participate in extra-curricular activities. There is also a lot of competition among law students, as everyone is trying to outdo each other (much like in other professional schools) to get that coveted internship or the highest grade in the class. Some external opportunities, such as semester exchange programs and accolades within the law school, are directly linked to academic performance, so working hard and earning good grades is encouraged. However, all of these experiences help you prepare for the real world while also pushing you to do your best. It also teaches you how to deal with various human emotions and how to react to success. Just don't get too caught up in it, and caffeine may become your best friend for a few years!

INTERVIEWER

Any advice that you would like to give to aspiring law graduates about securing positions or put out our resume to get into the corporate world and explore the corporate world?

VAISHNAVI GUPTA

I believe in hard work yielding great opportunities and never letting an opportunity pass you by. The first thing that a law student needs to understand is that learning law in books and practicing it is pretty different. While it is essential to thoroughly study the fundamental concepts as a part of the law school curriculum, it is also necessary to do as many law internships as possible. It really does not matter how well your internships are, how many big six internships you have. What matters, in the end, is learning. Sitting ideally in a big firm and working hard in a small firm is the line of difference that one needs to realize. The problem today is that we are learners, and the most important thing to learn is to analyse your own "calling." To explore your interest, or I may say "calling," is to answer the following three questions:

a) Does law interest you? [Remark- I have seen people completely changing their career path post taking

a law degree. Answering this becomes really important in the first place]

b) Is Corporate law your field?
c) For which firm do you want to work?

However, a word of caution; kindly note that the above questions do not have a timeline.

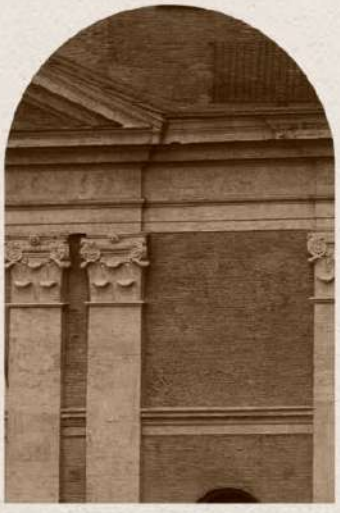
INTERVIEWER

What advice would you like to give corporate law aspirants on how they can be valuable interns or employees to their organization?

VAISHNAVI GUPTA

At least in terms of expectations, law firms do not distinguish between interns and first-year junior associates. As a result, every intern should conduct themselves and go about their work the same way that a first-year associate does. To that end, an intern should (a) show eagerness to learn and professionalism; (b) have an optimistic outlook; (c) be keen to learn and soak up things quickly; (d) be confident in voicing their views and inputs; (e) be able to handle pressure and come up with practical and commercial alternatives; (f) never be afraid of taking responsibility; and (g) be active in seeking feedback.

Articles



Over The Top with OTT Censorship?

By Madiha Pagarkar, & Riya Barve[1]

INTRODUCTION

Over The Top platforms or OTT platforms have seen massive growth in India in recent years. With an ever-increasing user base, these platforms have been pushing out content non-stop to meet the rising demand while remaining almost entirely unregulated. On the 25th of February, the Indian Government introduced the new Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, or the IT Rules, 2021, to replace the previous Information Technology (Intermediary Guidelines) Rules, 2011 under the IT Act, 2000. These rules have been enacted with the intention of providing a single regulatory framework to combat the increasing amount of child pornography and hate speech seen on these platforms.

While there has been a need to regulate and apply at least some degree of censorship, the way the IT Rules have been enacted, with no consultation with existing OTT players, may hinder one of the fastest-growing industries in the country. Factors such as costly penalties, a very small compliance window, vague and arbitrary guidelines, etc., may deter international companies from investing.

Additionally, online news platforms and social media sites also come under the purview of the new IT Rules, 2021. While including as many areas as possible under a single regulatory framework may seem like a good idea, it raises an important question. Should these three vastly different mediums really be under the same guidelines?

CODE OF ETHICS

The rules and regulations provided by the government for governing the OTT platforms include a code of ethics which prescribes news and current affairs to follow the Norms of the Journalistic Conduct of Press Council Act and the Programme Code of the Cable Television Act. Streaming platforms like Netflix and Amazon Prime Video have to make sure that their content does not affect the integrity and sovereignty of India. It also suggests that the platforms exercise discretion and due caution while dealing with the content related to multi-religious and multi-racial identities.

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All content curated online has to be classified according to the age-based content category, restriction of access to a child, measures to improve accessibility for persons with disabilities.

SO, WHAT DOES ALL THIS MEAN?

Foreign as well as Indian shows were prosecuted by the public as well as the media for being obscene, offensive to certain religions, or slanderous. The new laws compel OTT platforms to have a comprehensive three-tiered grievance redressal procedure to address customer complaints. The first level will consist of regulation by the OTT Platform itself, which will be carried out through the use of a grievance officer. The second level will consist of an institutional self-regulatory organisation that will be formed by content publishers and their groups. It will be chaired by a retired Supreme Court/High Court judge or other notable personality in the appropriate profession, and it will be composed of industry specialists. The MIB has established an inter-departmental committee at the third level, which will offer supervision and hear appeals for decisions made at the second level, as well as any complaints that have been submitted to the inter-departmental committee by the MIB. It also prescribes the content to be bifurcated based on not only age but themes, tones, impact, and audience.

However, it also raises some questions: Can someone who watched the content despite the warnings made available by the OTT platforms complain to the grievance officers? There is no clarity on this subject, as content warnings warn the viewers about what to expect in the upcoming art. However, they do not, nor can, control whether the viewer can view it or their reaction to said content. So, when a viewer reads the content and proceeds to consume the content, does he have ground to file a grievance? Do content warnings absolve the OTT platforms of their responsibility to the viewer? Are content warnings the new 'conditions apply' of the content producing world? The rules provided are subjective, vague and do not give grounds for registering grievances.

Now, we need to monitor the impact of these rules because, as we have previously seen, harmful and offensive content floats around various platforms despite there being regulations and categorisations for the same. Content is fairly easily and widely available on the internet, and enforcing laws against it is nearly impossible unless the government is willing to spend billions of dollars every year just to keep an updated web content filtering system up and running.

By using proxy servers, you can gain access to all websites located outside of India that have been blocked. Is it true that blocking orders serve as a catalyst for increased traffic? The answer to this

can be seen with the consequences of banning porn websites; India remains the world's 3rd largest consumer of porn. It will not be a successful initiative because you are increasing people's curiosity about it. So even if the government exercises its powers through the new amendment and regulates or blocks certain content on the OTT platforms, an uncensored version will always be available to people through different means. In this Internet Age, absolutely nothing is ever lost.

THE TANDAV CONTROVERSY: A CASE STUDY

To examine the effect the IT Rules, 2021 have on free speech and creative freedom; we explore a TV series released on January 15, just a month before the IT rules notification. Tandav, a web series released on Amazon Prime Video, an OTT Platform, was subjected to controversy immediately after release. Multiple Hindu groups from all parts of the country claimed that the series hurt the religious sentiments of the Hindu community. Since before the IT Rules, OTT content was not subject to censorship before release by the Indian censor board, the Ministry of Information & Broadcasting presented these concerns to the creators of the show. Multiple FIRs were filed throughout the country against the directors, producers, and actors of the show. After being summoned by the I&B ministry, Amazon Prime Video issued a formal apology and agreed to remove or edit the objectionable parts that were brought to their attention. In a statement issued subsequently, the makers thanked the ministry for "guidance and support" and apologised for "unintentionally hurting anybody's sentiments."

LEGALITY

Television broadcasts and movie theatres are vastly different from over-the-top (OTT) platforms. Instead of being forced to view a certain type of information, in the latter case, the audience can choose what they want to see in the privacy of their own home.

In other words, content streamed on OTT platforms is not broadcast, meaning that it is not intended for public exhibition; rather, it is intended for private viewing. As a result, it cannot be regulated under the Cinematographic Act, 1952, and it cannot be treated in the same way as television or cinema content. The third tier of the inter-ministerial committee is going to be following the guidelines of BCCC (Broadcasting Content Complaints Council), which was made for addressing the grievances of the public with regards to non-news general entertainment channels. The government came up with these new regulations because they realised that OTT could not be treated as Films or TV channels, yet they went ahead with treating it the same way. As a result, the formation of an IMC in accordance with the guidelines outlined above is not the best course of action.

As a statutory entity under the MIB Ministry, the Central Board of Film Certification (CBFC) may find itself involved in the censorship and filtering of OTT content, now that OTT services have been brought within the ministry's jurisdiction. If the CBFC is given the authority to regulate and censor OTT content, it will suffer the same fate as cinema and television broadcast. It will be censored on the basis of "obscenity," "immorality," and "religious sentiments," all of which are vague and open-ended terms, limiting the ability of creators to express themselves freely. The CBFC is well-known for misusing and overreaching the authority entrusted in it, as evidenced by the arbitrary censorship of films such as Udta Punjab and NH10.

A POTENTIALLY PROBLEMATIC SECTION

Section 3(2) the IT Rules lays out the specifics of the **Grievance Redressal Mechanism** and poses a serious threat to the right of freedom of speech and expression as any person can file a complaint at any time against content published on an OTT platform. This complaint must then be handled by a three-tier grievance redressal mechanism described in the rules as follows:

Tier One - *self-regulation by publishers:* A Grievance officer must be appointed, and their contact details, along with a mechanism by which a complaint can be filed, must be made available on the platform's website. The Grievance Officer must acknowledge the complaint within twenty-four hours and deal with it within fifteen days from the date the receipt was issued.

Tier Two - *self-regulation by the self-regulating body:* A body of six members must be formed by the publishers to deal with complaints that have been dealt with unsatisfactorily by the Grievance Officer. This body can consist of people from different fields or organisations such as media, child rights, human rights, entertainment, or even retired judges. While this is supposed to be a "self-regulating" tier, government involvement can be seen from this level itself, as this self-regulating body must first be approved by the Ministry of Information & Broadcasting.

Tier Three - *oversight by central government:* if the self-regulatory bodies cannot satisfactorily deal with the complaint, an appeal can be filed, after which the issue passes on to the Ministry of Information and Broadcasting. The Ministry of Information and Broadcasting must form an Inter-Departmental committee to oversee compliance to the code of ethics and deal with any complaints.

To understand why direct government oversight is a bad idea, we must only look at recent history. From police raiding Twitter's offices to oppositions' accounts being suspended, free speech has

not seen many liberties in this country since 2014. The raiding of offices is something independent media outlets have been subjected to for years. There have been systemic attacks on individuals' and organisations' right to free speech. We must finally learn to stop prioritising the adamant conservatives because it is convenient and find a way to balance values important to the conservative section of society with the non-infringement of basic rights such as the fundamental right to Freedom of Speech and Expression.

CONCLUSION

OTT platforms previously enjoyed a lot more freedom than their offline counterparts. Creators had the freedom to go to any length to put their story across to the audience. As a result, a great variety of perspectives and stories that the big screen may have previously neglected were being brought forward. However, with the recent atmosphere, OTT platforms, even before the IT Rules, were growing extremely cautious so as not to antagonise the government. These rules loom over the content creators threatening to bring an end to this onslaught of diversity and creativity as OTT platforms may choose the safer non-experimental route to prevent monetary losses. The clause that can be held culpable for the same is:

Clause II(A)(c) of the Code of Ethics made applicable to OTT platforms under the Intermediaries Rules, 2021, that states: *"A publisher shall take into consideration India's multi-racial and multi-religious context and exercise due caution and discretion when featuring the activities, beliefs, practices, or views of any racial or religious group."*

It is precisely this "multi-racial and multi-religious" background that make the IT Rules almost impossible to implement and highly impractical. While one of the goals of the said rules is to protect religious sentiments, prioritising religious sentiments of specific communities yet again over fundamental rights such as freedom of speech in a supposedly secular country is arguably misguided. Practising and propagating religion is a fundamental right but imposing it as morals and ethics to be abided by society is not.

These ambiguous IT rules give rise to a series of questions. Will the government give OTT platforms enough independence or be stringent? The guidelines claim to be 'self-regulatory,' but they are part of a regulatory system that has the potential to expand the government's ability to censor content significantly. This is accomplished by linking the guidelines to Section 69A of the IT Act, which requires that content be blocked. As a result of the regulations, the government has

the authority to intervene at any time. Following the implementation of the guidelines, content providers and OTT platforms may need to rethink their content development plans and concepts. The government justifies this by stating that these guidelines will help curtail harmful content and, with the right implementation, arm the users with the knowledge to make informed choices and create a level playing field between various mediums. However, only time will tell how effective these guidelines are and whether this compromise on creative liberties is justified.

Obstetric Violence in Brazil as a Violation to the Right to Information

By *Julia Moreira Maschio*[1]

INTRODUCTION

The fight against obstetric violence is constant and is mainly based on human rights, considering that this issue is a public health problem. In this sense, it is possible to notice the efforts of the Ministry of Health to create public policies to prevent and guarantee women's health. However, it is clear that practices such as episiotomy (cutting in the perineum region), Kristeler's manoeuvre (tummy pushed by nurses), artificial rupture of the bag, etc., are still very present and represent a cruel daily reality with parturient.[2]

The absence of specific legislation helps in the perpetuation of these practices, in which the doctor holds power in view of his knowledge, with a violent domain, and as a consequence, there is a violation of women's fundamental rights of freedom, autonomy and dignity, leading to a total vulnerability of the patient.[3] From this perspective, women undergo violent procedures because they end up trusting the doctor and believe that there is a real need for intervention to protect their health and that of their baby.[4]

However, when analysing the proportion recommended by the World Health Organization for caesarean deliveries per year, it is revealed that in Brazil, the percentage is 57%. This is a very high number, considering that the recommendation remains at 10% to 15%.

Performing the procedure unnecessarily ends up composing the risk factors that contribute to maternal and child mortality, as seen in (Figueiredo, 2017), *"greater risk of death and hospital infection for both the baby and the mother; risk of the baby being born prematurely, as there is a possibility of error of up to one week in marking the gestational age; increased incidence of respiratory diseases in the baby; greater difficulty in breastfeeding and probability of early weaning; bonding difficulties with the mother; higher risk of infertility from the*

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[2] DINIZ, Simone Grilo et al, *Obstetric violence as a public health issue in Brazil: origins, definitions, typology, impacts on maternal health, and proposals for its prevention*, 25, J HUM GROWTH DEV, 377-82, (2015).

[3] TEIXEIRA, Lara Azevedo et al., *Obstetric violence as a violation of women's right to health: a narrative review,* 18, HEA. CARE JOU' (2020).

[4] Wedge & Camila Carvalho Albuquerque, *Obstetric violence: an analysis from the perspective of fundamental rights* (2015).

mother later on; risk of endometriosis; long-term scar sensitivity (itching, pain, and stretching sensation); increased risk of thrombosis and related diseases (including embolism); higher rate of postpartum depression; between others."[5] Thus, it can be concluded that these surgical procedures are performed indiscriminately, without scientific proof of any need, violating women's rights, and not observing the WHO indications on the use of caesarean section only in therapeutic need.

THE CHOICE FOR BIRTH

Several factors affect the choice of the procedure at the time of birth, such as the duration of delivery, discomfort, and also medical pressure.

Normal delivery results from the natural action of the woman's body, which expels the foetus without medical intervention. In these cases, what defines the duration of delivery is the woman's own body, depending on the time interval between contractions; therefore, it can last up to 24 hours. In the public network, normal birth is still the most performed, in view of the recommendation of the Ministry of Health, with the implementation of public policy for humanized childbirth.

On the other hand, in caesarean delivery, the foetus is removed directly from the uterus and then a suture of the cut is performed, taking an average of 2 hours of the procedure. Therefore, in the private network, caesarean delivery is still the most chosen as it adds the convenience of surgery, such as the duration of the procedure, to the pre-existing lack of information and general medical position on it being the most beneficial to the parturient – without, however, scientific proof.

From this perspective, it is important to understand the existence of the myth of this type of childbirth. Cesarean delivery, in Brazil, is seen as the normal means of extracting the foetus, mainly due to the fear of normal childbirth, which is seen as something uncomfortable and painful. In this sense, a survey carried out by Vitória Greve in 2017 shows that "*more than half of Brazilian women (70%) want a normal birth in early pregnancy, but over time they are discouraged. Fear of the pain of normal childbirth and the unpredictability of the process are the two main factors that lead women to opt for caesarean.*"

[5] Jessica & Figueiredo, *Women's right to natural childbirth in Brazil: physician's civil liability* (2017).

However, in this same research, we have that *"for every 10,000 normal births, two women die. For every 10,000 C-sections, 7 die."*[6]

It is also necessary to mention the socioeconomic conditions of women. According to the AMB – Medical Association of Brazil, the value of a private birth is on average R$ 15 thousand Reais. In a survey carried out by the ANS – National Health Agency, in the demonstrative table, it can be seen that normal births are rarely chosen. In this context, it is visible that to pay for caesarean delivery in private and to have a subscription to a health plan, good financial conditions are needed.

Therefore, it is evident that the socio-economic conditions of women must be observed as they impact obstetric violence, which is generally practiced due to the lack of information. This will ensure that the right to information as a fundamental right is a woman's defence to guarantee her health.

THE RIGHT TO INFORMATION AS A GUARANTEE TO WOMEN'S HEALTH

In Brazil, the term "obstetric violence" is still very recent and has been understood as all physical, psychological, moral, and patrimonial violence against the parturient woman in three distinct moments: childbirth, postpartum, and puerperium. In a broader definition, the WHO states that "Obstetric violence is considered from verbal abuse, restricting the presence of a companion, non-consensual medical procedures, violation of privacy, refusal to administer painkillers, physical violence, among others. The statement also says that single women, teenagers, low-income women, migrants, and ethnic minorities are the most likely to suffer abuse, disrespect, and mistreatment. WHO further reveals that obstetric violence is a "violation of fundamental human rights."

In this context, according to what has been presented, it is possible to see that the choice of women for surgical intervention in childbirth comes in two moments: the fears that are dissipated by the beliefs that caesarean delivery is the most appropriate and the strong maintenance of this practice by medical institutions, considering that they are the most benefited by this choice.[7]

What should be noted is that information about both types of delivery is important, considering that, as soon as there is this information, the mother is fully able to consent and choose what will

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[6] Cesar G. Victora et al., *Maternal and child health in Brazil: progress and challenges*, 377 LAN. (LON. ENGL') 1863–1876 (2011).
[7] Correa & Daniela, Obstetric violence: the violation of women's reproductive rights.

be performed to her own body. Thus, the information provided is too important for women to defend their interests against obstetric violence.[8]

It is important to emphasize that the right to information is established in the Federal Constitution of Brazil, Article 5 and Item XIV:

- **XIV** - access to information is guaranteed to everyone and the confidentiality of the source is protected, when necessary for professional practice; [9]

Thus, there is the freedom to inform, as well as the right to be informed, which gives the person protection mechanisms against possible violence. Thus, the right to information is clearly an individual guarantee of each citizen.

- About health, Law 8080/90,[10] which provides for the conditions for the protection, promotion and recovery of health, in its article 7 establishes that:
  Art. 7- Public health actions and services and private services contracted or associated with the Unified Health System (SUS) are developed in accordance with the guidelines provided for in the. Art. 198 of the Federal Constitution, still obeying the following principles:
  - **V** - Right to information, to the people assisted, about their health;
  - **VI** - disclosure of information regarding the potential of health services and their use by the user;
- Completing the above, the physician still has the duty to ensure the information, in accordance with the Code of Medical Ethics and the Resolution of the Federal Council of Medicine No. 1931/09:
- **Art. 31.** Respect the right of the patient or their legal representative to freely decide on the execution of diagnostic or therapeutic practices, except in case of imminent risk of death.
- **Art. 34.** Failure to inform the patient of the diagnosis, prognosis, risks and objectives of the treatment, except when direct communication may cause harm, in which case, inform their legal representative.

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[8] Eduardo Cazelatto et al., *Right to information as a form of defense of obstetric violence*, 6 BJD 9523–9540 (2020).
[9] Federal Constitution of Brazil, Article 5, Item 14.
[10] Brazil, Law No. 8080/90.

Thus, it is clear that the parturient, when being clarified and informed about all the risks and amenities of the modalities of childbirth, assumes the risks of childbirth. The information then becomes a defence tool for her, regarding obstetric violence, as well as for the physician, who obtains the woman's consent about the procedure.

In this sense, says Jessica Figueiredo: "Women are victims of this system in three ways: due to their inability to implement a constitutional right to freedom of choice and to obtain the desired natural birth; because they are often deceived by doctors who use myths to convince them of the most advantageous birth for them; and for having, in the end, such a moment of bond with his or her daughter stolen, bearing fruit of physical or material, psychological or moral damage and even aesthetic damage. It is up to the law, therefore, to provide the instrument to indemnify such women in proportion to their damage and at the same time discourage doctors from continuing to perform unnecessary caesarean sections"[11]

Therefore, the choice for childbirth is only possible with the information, which still corroborates with individual freedoms, also affirmed by the Federal Constitution. Thus, the search for more human, ethical, and transparent behaviour by medical institutions is constant. It is not just about prevention, but about a cultural structure within Brazil about how women should be respected,[12] about how their rights should be more visible, and how their choice concerns their bodies. Nowadays, when we talk about the woman's power of choice regarding her birth, the right to information is human and fundamental.

CONCLUSION

This article focuses on the right to information as a tool for women's defence against excessively suffered obstetric violence. It is concluded that at the root of the problem, we find the lack of information, both from medical institutions and from women, in which the dissipation of misleading and baseless information leads women to have no choice when giving birth.
Information is, in addition to a right, a duty, which concerns the risks of each procedure, as well as a constitutional obligation to respect the right to freedom, dignity, and life.

[11] Figueiredo, Jessica. Women's right to natural childbirth in Brazil: physician's civil liability.
[12] Wedge, Camila Carvalho Albuquerque, *Obstetric violence: an analysis from the perspective of fundamental rights,* (2015).

Parental Liability for Prenatal injury

By Atal Anand & Pratik Sainy[1]

INTRODUCTION

In the past three decades, the child's right to claim damages from a third party has changed drastically. Injuries that affect the development of an unborn child resulting from another person's negligence are considered prenatal injuries. Before 1947, the Court usually denied the child's cause of action. However, nowadays, almost all states recognize the child's right to the action. It is also true that many courts will deny recovery "if the foetus was not visible at the time of injury."

Foetuses are recognized as individual patients by the medical profession; it also said that a foetus is a patient separated from the mother for few months, so the Law has considered that it is entitled to legal protection. Today, almost all states recognized a child's right to act against a third party for prenatal injuries. Nowadays, medical research rapidly establishes a general relationship between the various things that work under human control and particular complications occurring to the child. Some of the factors are- cigarettes, alcohol, drugs, and lack of proper nutrition and diet. The fast case in which a child is allowed for prenatal injuries is *Grodin v. Grodin*.[2]The Court permitted a child to sue her mother for prenatal harm; on one side, the law provides a woman the right to control her body. On the other side, the Law says that it is a child's right to be born healthy where she cannot consume or harm her body during the pregnancy period, ultimately affecting a child's development.

Early, i.e., in common law, which recognized that the prenatal harm suffered to the child had no foundation for an action in damages. By the time law is changed because various scientific proof developed that foetus has a separate existence in mother womb, which later assured the Court that the life exists in the womb is capable of Right different from mother itself. The recovery of damages due to prenatal harm in a brief existence has created considerable controversy like every case discussed the unique and complicated legal issue. The judiciary found it challenging to prove the relationship between prenatal injury and negligence act due to which it caused. The Court later said that "when a foetus reaches viability, the state may prohibit the mother from obtaining an abortion, except when necessary to protect the life or health of the mother." "The legislation regulating prenatal harm and deaths have undergone such a significant transformation that it reflects a near-complete shift in legalistic thought." The underlying question that judicial review is

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[2] Grodin vs. Grodin, 102 Mich. App.396 (1980)

grappling with is whether or not an unborn child has legal standing for the right of prenatal injuries, which allows individual to take action, apart from this, other issue encountered by the Court in assessing the challenges and truth in connection to the child's injuries.

DEVELOPMENT OF PRENATAL LAW

The first case to consider for a child to recover from his prenatal harm is *Dietrich v. Inhabitants of Northampton*[3]. Justice Holmes, a renowned judge of the Court of Massachusetts, denied the child the right to recover for the injury suffered. In this case, Dietrich established the direction of judicial decisions in prenatal harm for the next seven decades. These all things bar the suits between parent and child for tort like intentional or personal.

In *Hewellette v. George*[4], the Mississippi court refused the child's claim where he was clamming for civil redressal from his mother for personal injuries suffered due to malicious confinement in asylum and thereby created the parent-child immunity doctrine. Likewise, in *McKelvey v. McKelvey*[5]**,** the Court looked into the parental protection doctrine. In this case, too, the Court dismissed the stepmother's argument for personal injuries. The Court ruled that Hewellette has no power to impose what it described as a well-established law regulating parental-child relationships.

The above cases are a great example where Court strictly provided immunity to parent-child lawsuits. There is another primary argument developed from appreciation and compliance with the doctrine. The denial theory gave various justification like preservation from family, removal of child and parent custody, maintenance of prenatal authorities.

THIRD-PARTY LIABILITY AND PARENTAL LIABILITY

In India as per as govt. Data, 10 percent of all live birth of babies born with some defects and 25 percent of these defects are caused merely by some environmental factor during pregnancy. The high reported congenital malformation is solely the factor through which unborn child can raise their concern. Recently, the advancement of medical like implanting fertilized eggs in women's bodies, has increased fear and anxiety for the better health of a child. These things developed the child's right to sue a third-person tortfeasor for the negligent act that causes prenatal injuries.

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[3] Dietrich v. Inhabitants of Northampton, Massachusetts Supreme Judicial Court 138 Mass. 14 (1884)
[4] Hewlett v. George, 9 So. 885 (Miss. 1891)
[5] McKelvey v. McKelvey, ARKANSAS COURT OF APPEALS DIVISION I Nov 18, 2020, Ark. App. 536

In 1884, Massachusetts Supreme Court came across its 1st American opinion on tortious liability for prenatal injury. The name of the case was *Dietrich v. Inhabitants of Northampton*[6]. In which the Court relied on the lack of precedent and allowed recovery for negligently caused prenatal deaths. The premise was that the foetus was a part of the mother in a wrongful death action.

The decision not to recover damages for injuries sustained by a child in the venture. Three years later, in *William v. Marion Rapid Transit.*[7], where a subsequent child has suffered damages after this case, Ohio supreme court was the first tribunal to impose liability after this case law related to prenatal injuries get rapid acceptance.

To defend the various rights and succession in property of a child, there are many different but for the separate life of an unborn child "and defense against criminal conspiracy;" Law is not recognized correctly. The judiciary should adequately recognize the foetus which is separate existence for tort redress." The Law should not prioritize the protection of property over the safety of individuals.

VIABILITY THEORY

Apart from the universal recognition of proper action against prenatal injuries, the various courts have set their guidelines before claiming damages; a foetus must reach a given stage of development. Also, most of the country's recovery of damages is allowed when a foetus is visible during the injury suffered. The visibility rule is evolved from case to case like *Dietrich v. Inhabitant of Northampton*, which laid the concept that the foetus is part of the mother. Later in *Bonbrest v. Kotz*[8]**,** where tribunal court said: that the foetus could sustain life independent of a mother," which gave a new concept in the judiciary.

The rule of visibility is very complicated to apply because it is an interdependent concept. It depends on the development of an individual foetus. The age of the foetus is not the correct tool to measure visibility. Infect, there is no tool available to measure whether the foetus is visible at the time of injury suffered. It is impossible to measure visibility; visibility theory is impractical as a measuring tool for liability.

With the development of technology, abortion through an artificial machine is also evolved. The third-party liability for prenatal can only be possible if a child could prove proximate cause. The

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[6] Dietrich v. Inhabitants of Northampton, Massachusetts Supreme Judicial Court 138 Mass. 14 (1884)
[7] Williams v. Marion Rapid Transit, Chicago, Ill. Vol. 17, (Jan 1, 1949): 395.
[8] BONBREST et al. v. KOTZ et al., Civ. A. No. 26607.District Court of the United States for the District of Columbia (1946)

plaintiff must show that the mother is negligent of taking care which caused child disabilities or deformities.

Scientist has developed various tools to increase awareness of how environmental factors impact foetus, it became susceptible to legal proof. Even today, "teratology" is considered as the unusual degree of scientific speculation, incorrect perception, and mistake because no one can find positivity in it. Many theories and concepts have been developed to give a proper explanation of the environmental causation of congenital abnormalities. As per the theory, "congenital malformations result from injury to the foetus during certain critical periods when the embryo is susceptible to adverse influences." In the organogenetic period, abnormalities in a child occur if any disruption is caused during this critical period.

THE PARENTS & UNBORN CHILD

The parent can play a significant role in the development of prenatal injuries to their child. The most common prenatal injuries of a child arise due to maternal disruption. As we know, that child can recover from the third person for the damage caused to them; similarly, the child can claim damages from their parent. Many considerations apply whether the tortfeasor is a parent or a third person.

a. Role of a parent in causing Prenatal Injuries

The most familiar situation is when a parent is held directly responsible for causing prenatal injuries to their child when physical accidents result from parent negligence. However, there are other various ways in which an unborn child may get injured. However, nutrition plays a critical role in the health and growth of a child. According to the survey, 40% of children born with disabilities are due to a lack of proper nutrition intake during pregnancy. Lake of essential nutrition can affect the growth and development of the brain of a child. Also, a protein deficiency diet results in smaller babies. More minor birth weight children suffer from physical and mental defects and have a higher mortality rate.

The intake of drugs can hurt an unborn child. It passes through the placenta membrane of the mother's body. Consumption of any kind of drugs during pregnancy can cause injuries to the foetus. Some of the adverse impacts of drugs are quinine, which can cause deafness in children, antibiotics may damage bone development, and cough medicine can cause goiter, skeletal, or brain damage. Even paracetamol and sleeping pills can cause adverse impacts. Sometimes mother

exceeds the dosages of drugs that the foetus cannot tolerate and ultimately prenatal injuries to the child.

The adverse effect on foetal can be seen due to the maternal disease during pregnancy, and sometimes foetal death may also occur. Moreover, if disease occurs during the period, there is a high risk of developmental derangement. There are numerous ways parents can injure their unborn child, as the mother involves in sexual intercourse during the ninth month of pregnancy. She may be interested in doing heavy work or carrying a heavy load during the last stages of her pregnancy, or she decides to make available drugs to induce rapid labour during her pregnancy.

b. The Prenatal Right of autonomy

In some states, like "United States supreme court has recognized that a right of autonomy" also guarantees certain zones and personal privacy exists under their constitution. The individual right is the ordered liberty which is a guarantee from the official regulation. The Court has "assumed a congeries of particular discrete rights enjoying some Defence against violation even for the public good," even though it has not formulated a criterion for assessing "fundamentality." The Court has created a hierarchy of private rights to balance private rights with societal wellbeing. 'The Right to sovereignty protects parental discretion in certain matters concerning the child's health, as per the Court. Certain sides of the family bond, such as the decision not to conceive or bear offspring, and the freedom to decide on the child's educational" or religious upbringing, are also covered by this privilege.

When a person is restrained from acting, they are free to do it in another situation. For example, a person is free to jump and practice kicks in the air; he would not be liable until it hit someone in the process of doing so. According to the Court, "True liberty for all may not exist under the operation of a philosophy that acknowledges the right of each person to use his or her own, whether in respect of his or her person or property, regardless of the harm that may be done to others,"

c. Parent Autonomy and children right to be born sound

Even though the Court recognizes the uniqueness of the family relationship, which necessitates constitutional security of parental choice, it has ruled that "In matters concerning a child's wellbeing, the state has a broad range of powers to restrict parental freedom and authority.' The Law acknowledges an autonomous state interest in rearing and protecting children within its

boundaries under the doctrine of parents, i.e., patriae. According to the Supreme Court, "A democratic society's survival depends on the balanced, well-rounded development of young people into fully mature citizens, with all that entails. It can protect it from impeding restraints and dangers across a wide range of selections. Therefore, the state has to limit parental options when both child and parent interest collapses. 'Allowing minors to receive medical attention despite their parents' objections demonstrates that in judicial understanding, parental decisions are not necessarily the child's best interests. When the children's parents' rights and child rights collapse between each other, then the courts consider the value of the child's rights. There is a special right given to the parent in medical treatment.

CONCLUSION & SUGGESTION

When the number of courts abolishes the parent-child tort privilege doctrine, the parent's immunity combined with third-party liability becomes increasingly untenable. The contradictory and illogical dismissal of the parents becomes increasingly egregious and unfair, with medical science's growing knowledge of the various ways parents can permanently impair the child's physical and mental wellbeing.

Whether a stranger or a parent commits prenatal injuries, the act is punishable. The action is tortious, and the person who is performing it has no legal bearing. Parents' rights should be limited when it collapses with a child's request to be born whole when it comes to autonomy. To the correct obligation, Parents should be informed of the pregnancy as soon as they are aware of it or should be aware of it. The statute should recognize the responsibility to protect. At that point, the child will be given proper care, care that they need.

Holding the parent to the standard of a reasonably prudent expectant mother or father Liability for unreasonably endangering the foetus would be guaranteed by this standard. Simultaneously, by balancing the scales, such a standard Liability can be avoided in the parents' interest and the unborn child for behavior that a responsible parent would engage in.

A lawsuit for prenatal injuries brought by an infant against its parent has yet to be filed. Despite the challenges that such a suit can be registered, courts might be required to rule on such claims shortly. It is hoped that at that point, the courts would be motivated by the ordinary Law's hallmark versatility in adapting to changing circumstances.

REFERENCES

- Mary K. Kennedy, Maternal Liability for Prenatal Injury Arising from Substance Abuse during Pregnancy: The Possibility of a Cause of Action in Pennsylvania, 29 DUQ. L. REV. 553 (1991). https://dsc.duq.edu/dlr/vol29/iss3/5/.
- Carol Ann Simon, Parental Liability for Prenatal Injury, 14 COLUM. J.L. & Soc. Probs. 47 (1978). https://pubmed.ncbi.nlm.nih.gov/11665078/.
- Valerie D. Barton, Reconciling the burden: Prenatal Liability for the Tortious Acts of Minors, 51 EMORY Law journals,877 (2002). https://law.emory.edu/academics/journals/index.html.
- Shrinivas Shree, Tort Liability of Parent to a minor child, Indian Law Journal, Vol 26, issue 3, (2015). https://www.repository.law.indiana.edu/ilj/vol26/iss3/13/.
- Deborah Santello, Maternal tort liability for prenatal injuries, Suffolk UL Rev, vol 22, 747, 1998. https://dsc.duq.edu/cgi/viewcontent.cgi?article=2775&context=dlr.
- O. Shramova, The Right to Health of the Child in Prenatal Stage, LAW REV. KYIV U.L., Vol 4, 50, (2017).
- Erin L. Nelson, Prenatal Harm and the Duty of Care, 53 ALTA. L. REV., vol 4, 933, (2016). https://albertalawreview.com/index.php/ALR/article/view/439.
- Mark Aronson, Misfeasance in public office: A Very Peculiar tort, Melbourne University Law Review, vol 1,1-51, (2011). https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1703517/35_1_1.pdf.

Emergency Arbitration: A Climax for ADR in India

By *Kashish Khurana & Aaradhy Shrivastava*[1]

INTRODUCTION

The dispute resolution techniques have been emerged as a saviour for the lengthy time-consuming judicial procedures in India. The technique of Emergency Arbitration is one such interim dispute resolution technique that has been evolving for providing an effective resolution to the parties. Emergency Arbitration is like a ray of sunshine in the field of arbitration for those who want to protect their assets and evidence that might otherwise be altered or lost. Both the parties themselves usually agree upon such arbitration even before the constitution of a Tribunal for Arbitral hearings. The proceedings are generally carried according to the terms agreed upon by the parties and are carried on by an Arbitrator, known as Emergency Arbitrator.

This procedure of Emergency Arbitration differs from other dispute resolution techniques on the point of its speedy resolution and interim relief features. Though not protected status in our country's legislation, this dispute resolution technique has been attempted to include within the existing legislation concerning dispute resolution techniques by the judiciary.

CONCEPT AND ROLE OF EMERGENCY ARBITRATION

Emergency Arbitration is a concept that is similar to that of seeking interim relief in ordinary judicial proceedings. Emergency Arbitrations are primarily conducted in pursuance of an agreement that has been made between the parties in disputes, where there is a scarcity of time and urgency of the relief sought.

Over the past decade and a half, the concept of Emergency Arbitration has developed as a tool for many to seek some relief at the earliest. Emergency Arbitration as a practice was introduced by several arbitration institutions worldwide in the form of rules and provisions in their nation's legislation. The role of Emergency Arbitration becomes vital where there is the absence of an arbitral tribunal or any other institution that fails in providing speedy resolution along with interim relief to the parties to the dispute. It includes brief and rapid hearings conducted by arbitral

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institutions for hearing matters which mandate an urgent interim relief. The effectiveness of Emergency Arbitration, invoked by a party, rests on two essential wheels, namely[2]—

i. *Fumus Boni Iuris*— It states that emergency arbitration gives birth to reasonable and just possibilities that the party requesting for such mechanism will succeed on merits;
ii. *Periculum In Mora* states that if there is no direct grant of measures, their loss could not be compensated through damages.

In Pre-Emergency Arbitration times, parties were required to go to courts to obtain any interim relief, which was complex, expensive, and time-consuming. With the emergence of this new concept of Emergency Arbitration, parties now have a chance to seek some relief even before the constitution of an arbitral tribunal. Maintenance of confidentiality of the dispute and early relief comes as an added advantage with this innovation of Emergency Arbitration[3]. An Arbitrator appointed for Emergency Arbitration is known as an Emergency Arbitrator. The powers vested with an Emergency Arbitrator are equivalent to the powers provided to an arbitral tribunal working under the applicable laws. It includes the power to issue orders such as an order freezing assets, temporary, prohibitive, or mandatory injunctions, orders for the preservation and inspection of the evidence, anti-suit injunctions[4].

Since the parties seeking Emergency Arbitration wants urgent relief in their matter, the proceeding of Emergency Arbitration generally gets completed within weeks, if not days. In most cases, Emergency Arbitrator require from the party seeking Emergency Arbitration to establish[5] -

- Risk of severe harm or any harm which would be irreparable to the party seeking relief;
- An element of urgency;
- That there is prejudgment on the merits and
- That the balance of convenience weighs in its favour.

It is pertinent to note that the awards of Emergency Arbitrator are not binding on the arbitral tribunals. The final decision can differ from the interim award.

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[2] Singhania & Partners LLP, India: Emergency Arbitration in India: Concept and Beginning, India: Arbitration, Litigation and Conciliation, https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Begining.
[3] Shaheen Parikh, The developing compass of emergency arbitration in India, International Bar Association (June 3, 2021), https://www.ibanet.org/emergency-arb-india.
[4] S. Ravi Shankar, Indian Law relating to Emergency Arbitrator, LAW SENATE, https://www.lawsenate.com/publications/articles/Indian-Law-relating-to-Emergency-Arbitrator.pdf.
[5] Id.

STATUS OF EMERGENCY ARBITRATION AT GLOBAL LEVEL

With the increasing shift of people towards arbitration, the enforceability and acceptance of Emergency Arbitration at the global level are ever-increasing. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)[6] Is among the laws on enforcement of a foreign arbitral award. However, an award passed by an emergency arbitrator is not recognized by the Convention as it only recognizes final awards, and an interim award cannot be considered as final under law[7].

Apart from this Convention, several arbitration-friendly jurisdictions have realized the importance of Emergency Arbitration and have recognized it under their respective municipal laws. Singapore and Hong-Kong are the two examples who have recognized Emergency Arbitration under their municipal statutes to enable parties to enforce interim awards passed by an Emergency Arbitrator.[8].

Emergency Arbitration and emergency arbitral awards are duly recognized in the USA as well. The United States Court of Appeals, in 1994, in the matter of *Island Creek Coal Sales Company v. City of Gainsville, Florida.*[9], has under the American Arbitration Association (AAA) Commercial Arbitration Rules recognized the authority of interim reliefs provided to the parties, granted by an arbitral tribunal.

Similarly, in England, the England and Wales High Court has in the matter of *Gerald Metals SA v. Timis*[10] denied to provide any interim relief to the parties because it does not have the authority to grant urgent relief in this case. The Court further directed the parties that in such matters, interim relief is to be provided by an emergency arbitrator under the London Court of International Arbitration (LCIA) Rules. Thus, through this decision, the High Court highlighted the powers of the emergency arbitrator vested in them under the LCIA Rules.

Below is the list of International Bodies that have special provisions dedicated to conducting emergency arbitrations or procedures similar to emergency arbitration –

(i) Hong Kong International Arbitration Centre (HKIAC)[11]

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[6] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).
[7] Moonmoon Nanda, Worldwide: Emergency Arbitration Procedure, Singh and Associated (Jan 10, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/882216/emergency-arbitration-procedure.
[8] Ibid.
[9] Island Creek Coal Sales Company v. City of Gainsville, Florida 729 f.2d 1046 (6th Cor. 1984).
[10] Gerald Metals SA v. Timis, [2016] EWHC 2327 (Ch).
[11] Schedule 4, 2018 HKIAC Administered Arbitration Rules.

(ii) Netherlands Arbitration Institute (NAI)[12]

(iii) Singapore International Arbitration Centre (SIAC)[13]

(iv) International Chamber of Commerce (ICC)[14]

(v) Stockholm Chamber of Commerce (SCC)[15]

(vi) Swiss Chambers' Arbitration Institute (SCAI)[16]

(vii) American Arbitration Association (AAA)[17]

STATUS OF EMERGENCY ARBITRATION IN INDIA

In India, all the matters related to arbitration are governed by The Arbitration and Conciliation Act, 1996[18]. Unfortunately, the legislation mentioned above provides no explicit provision that deals with the concept of Emergency Arbitration. Even though, the Law Commission of India in its 246th report[19] recommended the inclusion of provisions related to Emergency Arbitration in the Arbitration and Conciliation (Amendment) Act of 2015[20], the recommendations were not made a part of the Act[21].

In the absence of such provisions in the legislature, the judicial interpretation of the existing provisions plays a vital role in providing a broader connotation to the concepts. The judiciary of our country has, on similar lines, attempted to grasp the essence of emergency arbitration into the existing provisions of the Act. Sec. 9[22] and Sec. 17[23] of the Act lay down the provisions for the interim relief to the parties on the order of the Court and arbitral tribunal respectively[24]. However, the parties to the arbitration are allowed to pray such interim relief from the Court but only when the tribunal cannot furnish the appropriate remedy.

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[12] Rule 9, NAI Arbitration Rules, 2015.
[13] Schedule 1, SIAC Rules 6th Edition.
[14] Article 29, ICC Rules of Arbitration.
[15] Appendix II, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
[16] Article 6, International Rules of the Arbitration Court of the SCAI.
[17] Part E, DIAC (Arbitration Proceedings) Rules 2018.
[18] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[19] https://lawcommissionofindia.nic.in/reports/report246.pdf.
[20] The Arbitration and Conciliation (Amendment) Act, No. 3, Acts of Parliament, 2016 (India).
[21] Astha Ojha, India: Status of Emergency Arbitration in India: From The Perspective of Domestic Arbitrations, L&L Partners (Aug 14, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/976170/status-of-emergency-arbitration-in-india-from-the-perspective-of-domestic-arbitrations.
[22] Ibid at 19, §9.
[23] Ibid, §17.
[24] Raffles Design International India Private Limited & Ors v. Educomp Professional Education Limited & Ors. (2016) 234 DLT 349.

ENFORCEABILITY OF INTERNATIONAL EMERGENCY ARBITRATION AWARD IN INDIA

Part II of the Arbitration and Conciliation Act deals with the enforcement of foreign arbitral awards. However, this part of the Act only permits the enforceability of the final awards of the Courts in India. However, recognition of any interim award arising from Emergency Arbitration has not been mentioned. There have been various instances that have come to light that revolve around the issue of enforceability of international emergency arbitral awards in India. However, due to the lack of specific provisions in India's arbitration legislation, there has been great uncertainty on the subject mentioned above matter for a long time.

Recently, the decision of Hon'ble Apex Court in the case of *Amazon.COM NV Investment Holdings LLC* v. *Future Coupons (P) Ltd*[25] has resolved the fundamental ambiguity of the issue. The Hon'ble Court in the present matter upheld the decision of the Delhi High Court, which stated that the Emergency Arbitral Award Passed by the Arbitrator at Singapore International Arbitration Centre is enforceable in India[26]. In the present case, the applicants moved to the Delhi High Court in March 2021 under Sec 17(2) of the Arbitration and Conciliation Act to enforce the emergency arbitration award dt. 25th Oct. 2020 against the respondents. The single bench of the Delhi High Court ruled in favour of the applicants and observed that such Emergency Arbitral Award is an order under Sec 17(1) of the Act.

The respondents challenged this decision through the first appeal to the division bench of the High Court. The Court put a stay on the order of the single bench. As a result, an appeal was further filed by the Amazon group before the Hon'ble Supreme Court of India. The Hon'ble Court upheld the order of the single bench of the Delhi High Court and ruled in favour of the Amazon group.[27].

The Court further observed that the institutional rules laid down under Sec 17(1) of the Act shall include an Emergency arbitrator within the meaning of 'Arbitral Tribunal.'[28]. This decision overruled the decision of the Delhi High Court in the case of *Raffles Design International India Private*

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[25] Amazon.com VN Investment Holdings LLC v. Future Coupons (P) Ltd., LL 2021 SC 357.
[26] Pooja Tidke, India: Amazon v. Future Retail – The Supreme Court of India Upholds the Validity of Emergency Arbitral Awards, Parinam Law Associates (Aug 12, 2021), https://www.mondaq.com/india/civil-law/1101076/amazon-v-future-retail--the-supreme-court-of-india-upholds-the-validity-of-emergency-arbitral-awards.
[27] Future Retail Ltd v Amazon.com Investment Holdings & Ors, CS (Comm) 493/2020.
[28] Manu Sebastian, Emergency Arbitration Award Enforceable in Indian Law: Supreme Court Rules in Favour of Amazon in Case Against Future Retail [Updated with Judgment], LiveLaw.in (Aug 6 2021, 10:37 am), https://www.livelaw.in/top-stories/supreme-court-rules-in-favour-of-amazon-in-case-against-future-retail-emergency-award-enforceable-in-indian-law-178981?infinitescroll=1

Limited & Ors. v. Educomp Professional Education Limited & Ors[29]. which observed that the emergency award passed by the emergency arbitrator could not be enforced under the Arbitration Act[30]. The Court also relied upon the judgment of *Avital Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd*[31]. Moreover, it has been held that the mere fact that the recommendations of the Law Commission have not been made part of a statute could not lead to the conclusion that such provision cannot be made part of such legislation.

The present case also dealt with a further issue that concerned whether the decision of the Single Judge Bench for the enforcement of the emergency arbitral award is appealable or not. The Hon'ble Apex court further observed that no appeal lies against the decision of the Single bench judge of the Court under sec 37[32] of the Act against such order of enforcement of Emergency Arbitral Award made under Sec 17(2) of the Act.

CONCLUSION

The mechanism of Emergency Arbitration is an internationally recognized form of dispute resolution in the arena of arbitration. It aids in the speedy resolution of disputes that may tend to take longer and impose financial and mental burdens upon the parties to the dispute. However, this mechanism has not been recognized through legislation, unlike other forms of dispute resolution in India. This non-recognition of the concept led to the interference of the judiciary at different points of time, which as a result, formed a positive approach towards its enforcement in India. Further, the judiciary has not just included the emergency awards passed by the Indian Emergency Arbitrator. However, it has also recognized the enforceability of a foreign emergency award in the nation.

The position of emergency arbitration can be further improved by including the provision in the legislation on lines of the judgment of the Hon'ble Supreme Court and report of the Law Commission of India.

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[29] Supra at 23.
[30] Amit Vyas, The Viewpoint: Enforceability of Emergency Award in India, Passed in Foreign Seated Arbitration, BarandBench (Apr, 15, 2021, 11:12am), https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration.
[31] Avitel Post Studioz Ltd. &Ors. v. HSBC PI Holdings (Mauritius) Ltd, 2020 SCC OnLine SC 656.
[32] Supra at 19, §37.

Retrospective Tax Repealed: A Step in The Right Direction?

By *Kumar Shubham*[1]

INTRODUCTION

The passing of The Taxation Laws (Amendment) Bill, 2021, the 14 years controversy of retrospective taxation has ended. This bill seeks to amend retrospective tax on the transfer of value of foreign shares if those shares accrue value from assets in India. The primary objective is to refund Rs 8100 crore collected through retrospective tax law, which sought to impose taxes on transfers before May 28, 2012. This bill is likely to end the ongoing legal spat between the Government and Cairn and Vodafone. They are more likely to endorse the decision. The retrospective tax has been a sore point for potential investors until now, and they have constantly been vying for its removal. Naturally, the removal has seen a positive build-up amongst investors and companies alike.

WHAT IS RETROSPECTIVE TAX?

Retrospective means 'looking back over past' or simply in legal terms means

taking effect from a date in the past. So, retrospective tax means a tax on transactions applicable from a specific date in the past. It intends to create an additional tax levy.

Retrospective tax in India was introduced in 2012 by an amendment to the finance act, which enabled the Government to levy tax on a transaction involving the transfer of shares in a foreign company with assets situated in India.

EVOLUTION OF THE CONCEPT

The taxation of income from offshore assets within section 9(1)(vii) of the Income-tax Act, 1961 was first discussed in Ishikawajma – *Harima Heavy Industries Limited. v. DIT*[2]. Herein, the Court elaborated on the principle of 'territorial nexus' and held that "*the entire services have been rendered*

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[1] 4th Year B.A. LLB (Hons.), Gujarat National Law University, Gandhinagar.

[2] (2007) 3 SC 481

outside India, have nothing to do with the permanent establishment, and can thus not be attributable to the permanent establishment and therefore not taxable in India."

To dilute the effects of this judgment, an explanation was added to section 9(2) of the income tax act,1961. The said explanation was to have a retrospective effect and clarified *"that any income by way of services, royalty or income of a non-resident shall be deemed to accrue or arise in India by way of service, royalty or income in respect of interest shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India or the non-resident has rendered services in India."*

This pattern of adding clarification and making it applicable retrospectively continued through. This slowly evolving pattern became a tussle point between the companies and the Government. Two major tax disputes that resulted in an intense legal battle and financial consequences for India came ahead.

VODAFONE CASE

The Vodafone case[3] was the main factor that propelled the Government to bring retrospective tax amendment in 2012.

Vodafone acquired stakes in CGP investment Ltd. from a Hong Kong-based company named Hutchison Telecommunications in the year 2007. Entire transactions transpire outside India. The I.T. department issued a show-cause notice to Vodafone as to why taxes were not deducted on instalments paid to Hutchison as a CGP shares transaction impacted the indirect transfer of shares from Indian assets.

The matter reached the apex court, and the issue that was framed was whether "*the transfer of shares between two foreign companies, resulting in extinguishment of controlling interest in the Indian Company held by a foreign company to another foreign company, amounted to transfer of capital assets in India and as such chargeable to tax in India.*" The Court observed that the *"basis of levy of tax is the source and such source is the location where a particular sale takes place and not the place from where a product is purchased or derived from. Since the sale between VIH & HTIL took place outside the country, the source must be considered outside the country. It held that the selling of HTIL's CGP shares to Vodafone or VIH does not amount to transfer of capital assets under the scope of Section 2(14) of the Income Tax Act and therefore not chargeable under capital gains tax on all rights and entitlements resulting from the shareholder agreement, etc., which form an integral part of GCP's shares."*

[3] [2012] 1 S.C.R. 573

Therefore, the Court ruled that the I.T. department is not empowered to levy tax on two non-resident entities if they transact to acquire a stake in a resident (India) company.

Then Government became unsettled with this decision. So, they amended the tax law retrospectively in 2012 to get the demanded money.

CAIRN CASE AND ITS RELEVANCE

The dispute of Cairn goes back to 2006 when Cairn, U.K., through IPO reorganization, transferred its share in Cairn India holdings to its Indian subsidiary Cairn, India – backed by the retrospective tax; the I.T. authorities made a tax demand worth Rs 20,495 crore. The tax demand was sought on the alleged capital gain that Cairn made through the 2006 IPO reorganization.

Cairn interpreted the text of Indian law differently and refused to pay. Aggrieved by the order, Cairn pursued various domestic remedies and later filed a case before the Permanent Court of Arbitration (PCA). PCA rendering its judgment ruled that the "*Tax demand against the claimants (Cairn Energy Plc and Cairn U.K. Holdings Limited) in respect of AY (assessment year) 2007-08 is inconsistent with the treaty and the claimants are relieved from any obligation to pay it and orders the respondent (Indian government) to neutralize the continuing effect of the demand by permanently withdrawing the demand.*" Consequently, it awarded nearly Rs.8000 cr. to Cairn.

WHY DID GOVERNMENT FEEL IT NECESSARY TO BRING THE LEGISLATION?

The Government had constantly been facing criticism for its retrospective tax legislation since its inception. Many business lobbies had been invariably appealing for the reversal of this legislation. For instance, a business lobby group in the USA had written the erstwhile Prime Minister Manmohan Singh that *"the sudden and unprecedented move (retrospective tax amendment bill) has undermined confidence in the policies of the government of India towards foreign investment and taxation and has called into question the very rule of the law.*"

Apart from these, various cases were filed against the Government in international arbitration. In 2014, Vodafone initiated arbitration in Hague under Article 9 of the Bilateral Investment Treaty between India and the Netherlands. Article 9 of the said treaty says that "an investor of one contracting party and the other contracting party in connection with an investment in the territory of the other contracting party" shall as far as possible be settled amicably through negotiations.

The Permanent Court Arbitration, Hague, ruled in favour of Vodafone. The Court observed that India had violated the Bilateral Investment treaty between India and Netherlands and termed the act of the income tax department as a breach of the 'fair and "equitable" treatment principle. It held that any attempt by the Indian Government to enforce this tax demand would be a violation of its international law obligation and would attract severe consequences.

After Vodafone, Cairn also filed a case in the Permanent Court of Arbitration, Hague challenging the Indian order of retrospective taxation related to 2006-07 internal rearrangement. the Court ruled in its favour granting it an award of $1.2 billion.

Orders by PCA giving the power to seize India's sovereign assets gave a severe dent to the reputation of India when it was trying to portray itself as an investor-friendly state. To save its face from international embarrassment and convey the clear message that India would auto-correct even when its situation is not conducive, it brought The Taxation Laws (Amendment) Bill, 2021. This bill seeks to amend retrospective tax on the transfer of value of a foreign share if those shares accrue value from assets in India.

WHAT LIES AHEAD?

Currently, 17 companies are litigating against the Government of India against retrospective taxation. The Government conveyed that they would start the refund to the companies, withdrawing the litigation and arbitration cases against it. Out of 17, at least 7 of the companies have approached the Government to settle the dispute. Nevertheless, Government is yet to come up with the rules for retrospective tax and procedure for the refund.

This move will likely settle the dispute as companies like Vodafone and Cairn have shown interest in reaching an amicable solution. It is likely to boost the confidence of foreign investors in India who have long seen India as an unfair and unpredictable regime and would also help end unnecessary and prolonged litigation.

CONCLUSION

The scrapping of retrospective tax has given confidence to companies like Vodafone and Cairn. The end of retro-tax serves a dual goal. First, it is more likely that companies like Vodafone and Cairn would not pursue any further arbitration or litigation proceedings given their business in India. Second, it has cleared the image of India as an unpredictable or unfair regime as the end of

retro-tax has provided an image of policy stability for future India. The decision also reiterates India's commitment to honour the rule of law and treaty obligations.

Assessing the Viability of Green Channel Route for Combination Approvals in a Resolution Plan

By *Priya Ganotra & Sharvari Manapure*[1]

INTRODUCTION

In India, the Competition Act 2002 (hereinafter "Act") follows the philosophy of fostering competition and protecting markets in India from anti-competitive actions. However, in any market, a firm may find it difficult or unable to deliver its goals and business activity can fail, resulting in default in repayment of debts. This default is a legitimate result of a firm's business operations and may result in insolvency. However, the revival of all insolvent firms in a market is not always possible. Firms may look for means to restructure a defunct firm and work towards its revival in such a case. This puts into effect the operation of the Insolvency and Bankruptcy Code 2016 (hereinafter "I&B Code" or "Code") works as a market-directed regulation offering a time-bound resolution mechanism.

Consequently, the use of mergers/amalgamations or acquisitions may be done to revive such an insolvency enterprise in the Code. In such a case, the regulations concerning "combinations" become relevant as many times resolution plans can include combinations as a part. While the Competition Commission of India (hereinafter "CCI") is the entrusted body to overlook the approval of combinations, the Act and the I&B Code need to work in coordination.

In this article, the author(s) explores the interplay between the Act and the I&B Code regarding the approval of combinations in a resolution plan. The article examines the theory and concept behind such interaction. It determines the viability of the green channel route for approving combinations. The authors conclude and recommend the ideal mechanism which must be followed to obtain combination approvals from CCI for combinations arising out of the Corporate Insolvency Resolution Process (hereinafter "CIRP").

BACKGROUND OF REGULATION OF "COMBINATIONS" BY CCI AND INTERACTION OF THE ACT AND I&B CDE

India's competition law was enacted to understand that a firm has the freedom to undertake business activity but not refrain from other firms' freedom to do the same. Since 2011, the Act has played a crucial role in reforming and regulating the merger regime. Mergers and acquisitions have

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become an integral part of the corporate and business sector and serve as a "restructuring tool" to enterprises. The Act has a specific set of provisions regulating "combinations," which essentially includes mergers, amalgamations, and acquisitions when it comes to the competition law regime. In the Act, a combination is defined as the-

"*Acquisition of control, voting rights or assets, shares, acquisition of control by a person over an enterprise wherein such person may have a direct or indirect control on another enterprise involved in competing businesses, and mergers and amalgamations between or amongst the enterprises when the combinations exceed the threshold of the Act*"

The competition legislation in India is graded with a specific higher level of threshold limits to govern combinations within § five and §6. In the regime, every combination must obtain the CCI's approval before finalizing the transaction. The CCI approval is given after it conducts an inquiry into the combination and forms a prima facie opinion as to whether a combination is causing or has any likelihood to cause an appreciable adverse effect on the market[2]. Interestingly, the Act also plays a significant role in administering combinations within the I&B Code. This interplay is witnessed because during the operation of CIRP, a resolution plan may involve a combination wherein a competitor attempts to acquire an insolvent company/corporate debtor, and this is the point of interaction between India's insolvency and competition law.

When a combination forms a part of a firm's proposed resolution plan, the resolution plan proposed in the CIRP must seek the CCI's approval. This approval for I&B Code-driven combinations in a resolution plan by the CCI was first realized through the recommendations in the Report of Insolvency Law Committee of March 2018 (hereinafter "First Insolvency Committee Report"), which stated that CCI must approve combinations driven by the Code within 30 days from the date of filing a notice concerning such a combination.

However, the First Insolvency Committee Report failed to address the exact stage of sending such notice and its approval. This confusion was resolved through the I&B Code (Second Amendment) Act (hereinafter "Amendment Act") in 2018 that added §31(4) to the I&B Code. According to §31(4), a resolution plan has to be approved by the CCI before it obtains the CoC's approval[3].

However, when the I&B Code was first enacted in 2016, the CCI's approval was not explicitly given at a prescribed stage of the CIRP. Additionally, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 in its Regulation 37(1) mandated that the resolution process must obtain due approval of Central and State

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[2] Sonalika Ahuja, *Regulating Combination Under Competition Law in India*, Taxmann, [2019] 112 taxmann.com 393 (Article).
[3] The Insolvency and Bankruptcy Code, 2016, Proviso to §31(4), inserted vide The Insolvency and Bankruptcy (Amendment) Act, 2018 (w.e.f. June 6, 2018).

Governments and other authorities. However, no specific time was given for the same. Only after following the recommendations of the First Insolvency Committee Report a separate class of CCI's approval to other statutory approvals given under §31 of the, I&B Code and a fast-track approval of combinations within a resolution plan was sought. The Amendment Act provided for such approval to be done before CoC's assent.

The purpose of notifying a combination to the CCI is to investigate these combinations to check if they conform to § five and §6 of the Act. When an enterprise is insolvent, and a merger is taking place, it is vital to assess the impact of such a transaction. Hence, to prevent any anti-competitive impact and excessive market concentration, the CCI looks into the combination to evaluate possible adverse effects. Of course, suppose any combination is found to be causing an appreciable adverse effect on competition within the market or is likely to cause such an impact. In that case, the combination is deemed to be void[4].

Further, if the CCI's approval before CoC is based on the understanding that if after the completion of CIRP it is found that the combination has an adverse impact, the entire CIRP would be ruined at the end stage and would not give CoC the ample opportunity to find another resolution applicant offering a less anti-competitive[5] plan. We must note that the I&B Code is a time-bound legislative mandate that prescribes a limit of 270 days to finish CIRP and hence if a resolution plan fails in the end, the corporate debtor shall be pushed into liquidation thereby frustrating the Code's objectives, value reduction of corporate debtor's assets, and drop-in recovery rate. Hence, the Amendment allows the CCI to approve, or reject or modify a combination that is a part of a resolution plan (if required) before it obtains CCI's approval to not derail from the I&B Code's objectives as well.

In 2019, however, the CCI further took upon itself to streamline the merger control regime in India sought to deviate from its suspensory" model wherein the merger could not be implemented till it received CCI's thumbs up and brought in the "green channel" route for seeking approval of combinations. In this voluntary model, automatic approval of mergers is officiated. Any enforcement order concerning its modification/prohibition is taken up afterward. This voluntary regime has been extended to the I&B Code-driven combinations as well. The parts ahead survey the concept of this green channel route in India w.r.t. their application to the combinations in a CIRP.

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[4] Id.

[5] Ribhav Pande, *Notice of Combinations in Insolvency Resolution*, NUJS Law Review, 14 NUJS L. Rev. 1 (2021), p. 8.

CCI'S GREEN CHANNEL ROUTE FOR COMBINATIONS

In July 2019, the Competition Law Review Committee Report (hereinafter "CLRC Report") suggested a fast-paced regulatory for approval of mergers and acquisitions forming a part of combination notifications being sent to the CCI. This led to adopting the green channel route as a voluntary merger mechanism for combinations that are not likely to lead to an appreciable adverse effect on competition in the relevant market. According to the CLRC Report, the green channel route was given effect via insertion of Regulation 5A to the Combination Regulations 2011 by the CCI (Procedure concerning the Transaction of Business Relating to Combinations) Amendment Regulations 2019 (hereinafter "Amendment Regulations 2019")[6]. Additionally, in Schedule III of the Amendment, the parties are provided with the criteria/requirements they must fulfill to utilize the green channel route. Following Regulation 5A (1), the parties of specific categories must provide a declaration that their combination shall not result in an appreciable adverse effect in competition to the relevant market. Once the parties file a notification in this prescribed format and are subject to verification of the details provided, and if the combination falls within specific categories, a combination will be deemed as approved by CCI upon its acknowledgment. Any combination that fails to meet these criteria would be deemed void ab initio by the CCI after being heard on the matter[7].

In a simple sense, the green channel route constitutes a self-certifying and automatic system of combination approval wherein the parties to the combination can self-assess and undertake a pre-filing consultation with the CCI to ascertain if they qualify for the merger mechanism. The privilege of green channel approval has also been extended to combinations within the I&B Code's administration of an insolvent entity. The objective of including green channel approval in I&B Code-driven combinations was to reduce the transaction costs arising due to a merger which are unlikely to lead to an appreciable adverse effect on competition.

It is crucial to understand that the green channel approval is based on "failing firm defense." The failing firm defense mechanism is an exception to the general acceptance of combinations within the Act. Herein, the anti-competitive effects of a failing firm are equated alongside the anti-competitive behavior of its acquiring competitor firm. If it is revealed that the firm's anti-competitive effects do not outweigh the anti-competitive effects of the dominant acquiring firm, then an approval grant to such a combination is provided. In such a case, a three-stage test is

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[6] The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2019, Reg. 2.

[7] Ribhav Pande, *Notice of Combinations in Insolvency Resolution*, NUJS Law Review, 14 NUJS L. Rev. 1 (2021), p. 19.

relevant- firstly, whether the failing firm (insolvent entity) is about to exit the market because of financial agony; secondly, if there exists an alternative entity that wishes to acquire the failing firm and result in a less anti-competitive transaction, and thirdly, whether the firm would face imminent danger or be forced out of the relevant market such a merger's absence[8]. If the answer to the three-stage test is affirmative, the combination is allowed.

ANALYZING COMBINATIONS IN THE CODE VIS-À-VIS GREEN CHANNELS

Though the green channel route is a shift from the suspensory model of competition law to a more voluntary regime, assessing the viability of green channel approval for combinations arising out of CIRP is vital. One must note that the enactment of the Act in India ensured that firms operate on a level playing field in the relevant market. Within §20(4)(k) of the Act, the "possibility of a failing business" shall be a determinant factor in ascertaining if a combination would be resulting in or likely to result in an appreciable adverse effect of competition within the relevant market structure. Additionally, even the Raghavan Committee Report 2000 argues that the law's essence and spirit are for the preservation and promotion of competitive process that promotes efficiency and economic growth.

However, the failing firm defense mechanism within the green channel route does not even allow the CCI to scrutinize a merger since interim resolution plans automatically qualify for CCI's approval. To date, CCI has approved sixteen interim resolution plans post regular scrutinization by the CCI through a case-to-case analysis- without applying the green channel route. This means that we are yet to witness a combination that leads to appreciable adverse effects on competition. Hence, no guarantee can be taken as to whether future resolution plans in a CIRP will not result in appreciable adverse effects. As mentioned earlier, the green channel route runs on self-certification. Hence, it will always be tough to determine the weight of a merger on the financially distressed firm and the relevant market. A voluntary mechanism cannot alone be used to determine a weight of such a transaction through self-assessment.

Additionally, CCI's mandate is very crucial in a CIRP and has an independent role. If at all resolution plans continue to get a fast-track approval and its anti-competitive effects were realized at a later stage- the combination would require modifications or be declared void. In a scenario like this, the inconvenience to the CoC and I&B's resolution procedure will be much more amplified. When a financially distressed firm is being considered for a combination- the intent is to revive the firm and survive. In a regular CIRP, a resolution plan is rejected a new one can be

[8] Bhumesh Verma and Ishika Chattopadhyay, *Green Channeling of CIRP's: Pros and Cons.*, (2021) PL (CL) February 71.

called for as the next best alternative. However, in a green channel route, the situation is not so. Thereby, troubled by an anti-competitive effect, the financially distressed firm may find itself detangling from such a merger and work towards separating its assets from the dominant. In actualization, this could be immensely troublesome for a firm already in a weak position and struggling in financial agony. This quickly deviates from core principles of the I&B Code and would also dilute the role of CCI in performing its essential functions.

CONCLUSION AND RECOMMENDATION

In recent times, the merger control regime in India has been shifting from suspensory to voluntary. This impacts the working of the CCI, the principles of the Code and will create a more complex regime for governance of combinations; instead of simplifying it. If the Amendment Regulations 2019 are applied uniformly, it will adversely impact the interest of stakeholders in CIRP and only increase prospects of liquidation if the firm seeks to disengage from the merger after fast-track green channel approval. This would derail from the primary intent of the operation of the I&B Code- making liquidation the last resort for an entity.

The CCI's approval of the resolution plan before the CoC regularly helped maintain consonance between the laws and allowed I&B Code to obtain CCI's approval at the earliest stage of a resolution plan. This provides for a level of coordination between the two laws. Nevertheless, the green channel approval may have a false sense of security since CCI has not rejected a combination. This increases the possibility of an adverse competitive impact on businesses, consumers, and disharmony between the operations of the laws.

In our opinion, the CCI must continue with its prudent practice of approving combinations and shall stay true to its independent, distinct role. Only because this prudent practice also allows the CCI to ensure the sanctity of the CIRP by allowing CoC to consider other resolution plans. Hence, the green-track approval may only be used as a tool for scrutinizing mergers/combinations but cannot substitute the entire procedure for approval. Hence, the Amendment Act for approval of combinations by the CCI is the ideal mechanism for CIRP, which shall result in a harmonious arrangement between the laws and subserve CCI's commercial wisdom and independent role.

The Prevention of Cruelty to Animals Act, 1960: Prolonged Injustice

By *Mishi Aggarwal*[1]

INTRODUCTION

"The greatest privilege that comes with freedom of speech is using your voice for those who don't have one."- Ricky Gervais

The purpose of the law is to keep human actions in check in order to make sure that every being is not just alive and surviving but also living with dignity and liberties. Even though only mankind is competent to be aware of the laws in place and act upon them, the law also offers protection to other entities that constitute a society such as animals. Animals are defined as living organisms that are not human.[2] However, what makes humans and animals alike is the ability to perceive certain senses. Animals are sentient beings which means they are capable of feeling pain and other sensations. This brings about a need to understand that their rights need to be protected too. However, mere laying down of rights is not of much advantage to these voiceless beings since they lack the ability to fight for the same. Thus, a more constructive way to ensure the protection of animals would be to lay down laws for someone capable of understanding the duties and reverberation of one's acts.

It would be fair to say that despite the existence of multiple provisions of the law under different legislations relating to these animals, none of these are truly effective in achieving the goal because the punishments for offences committed now are based on several decades-old legislation. A law is only as useful as its implementation and no reformations in a 60-year-old law demonstrate how the subject of animal protection is far from getting the kind of significance the subject deserves.

The issue of animal cruelty does not happen in isolation with respect to animals. It is concerned with human behaviour. Studies have shown that a person who is likely to execute any kind of animal cruelty is likely to have behavioural issues and has the potential of hurting fellow human beings. The actions of a person in one regard reflect the behaviour of the person in all regards. This implies that an offender under the Prevention of Cruelty to Animals Act is not just a threat to animals but also society as a whole and deserves to be held liable accordingly.

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[2] The Prevention of Cruelty to Animals Act, 1960, § 2 (1), Acts of Parliament (1960).

Additionally, a great deal of cases of animal cruelty do not even see the light of the day because these matters are either hushed up or go unreported since animal lives are not protected adequately under the current provisions. The parliament has protected them by way of certain legislations but has not acknowledged the need for updating of the same. This reveals that the cost of the ineffectiveness of the parliament in enacting appropriate legislation on the matter is borne by the voiceless beings in countless ways.

CURRENT STANCE OF LAW

There is nothing unknown about the greed of the human race and its potential to exploit nature for its advantage. The plight of animals is just one such instance. It is believed that even the smallest of human wants is superior to the basic needs of other non-human living organisms. This is termed speciesism. Speciesism is the idea that being human is a good enough reason for human animals to have greater moral rights than non-human animals. Regarding the life of one species as more valuable than others leads to exploitation of the inferior one, which yielded the enactment of the PCA Act. However, after almost 62 years, it is safe to say that the PCA, 1960, is falling short in achieving the objectives that it was enacted for. The Act reduces the status of an animal to a thing because it is based on the concept of ownership of an animal and the penalty for any untoward act of cruelty against them attracts fines ranging from Rs. 10 up to Rs. 50 including beating, kicking, torturing, starving, overloading, overriding, and mutilating, all of which are done to animals.[3]

The Prevention of Cruelty to Animals, 1960 is the principal welfare legislation that was enacted to protect the animal population of the country. It dictates instances that are classified as cruelty and also prescribes the punishment in case of commission of the offences mentioned thereunder. Section 11 of the Prevention of Cruelty to Animals Act deals with instances that are termed animal cruelty. It provides for direct physical harm like beating, kicking, torturing, and inflicting unnecessary pain along with passive means of harm like administering any injurious substance to any animal. The section clearly provides for other cases, which are also termed cruelty. These can include confining an animal in an unreasonable space for an unreasonable time, abandoning it without reasonable cause, or employing it for any unsuitable work. This implies that the drafters of the legislation did not aim to protect merely the survival of animals but also to make sure that they are treated properly and their lives are valued as that of other living beings.

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[3] The Prevention of Cruelty to Animals Act, 1960, § 11, Acts of Parliament (1960).

In addition to the Prevention of Cruelty to Animals Act, the Criminal Code of India and the Indian Penal Code, 1860, also dictate punishments for acts of animal cruelty. They also make space for criminal intimidation if there is any kind of threat or abuse being experienced for taking care of the animals. The Criminal Code, being comparatively firmer in its approach, has made the acts of killing or injuring any animal cognizable, thus reflecting on its sturdy stance.

Furthermore, the protection and compassion towards animals is also a constitutional goal under Article 51A(g). The Supreme Court was of the view that the Prevention of Cruelty to Animals Act must be read in conjunction with article 51A(g) of the Constitution of India. [4] Even though these prescribed duties cannot be enforced in a court of law, it acknowledges the need for the equitable treatment of animals.

The law of the country is the pedestal on which the entire system works. It stands as a backbone as all the other administrative and government bodies work as per the word of the law. The existing Prevention of Cruelty to Animals Act does not, in any way, deter or punish the offender for the wrongdoing. Rather, the Act sides with the offender, who willingly chooses to bear with the fine which is based on a 60-year-old law.

ATTEMPTS TO AMEND

Although the provisions for the protection of animals were provided under three different legislations, the lack of accomplishment of the goal has been clear for a long time now. Hence, quite a few attempts were made to bring the legislation at par with its objectives.

In the year 2011, the draft of the Animal Welfare Act was sought to be passed to replace the current Prevention of Cruelty to Animals Act, 1960. The act attempted to make the provisions of animal protection more comprehensive and effective, taking into consideration the changes that have taken place since the enactment of the original Prevention of Cruelty to Animals Act. Post the Supreme Court's acknowledgement of the fact that the Prevention of Cruelty to Animals Act needed to be amended, a new Animal Welfare Bill was introduced in the year 2014, with a view to incorporate adequate penalties and punishments. Unable to spot any action being taken for the welfare of animals, the citizens of the country came together with the hashtag #Nomore50 in order to push the government to make the necessary changes to the age-old legislation. This led to the introduction of the Amendment Bill of 2016, which not only sought stricter punishments

[4] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, 8 SCC 534 (2005).

but also sought to change the status of offences under the PCA act from non-cognizable to cognizable.

The proposed amendments have talked about placing the life of an animal over religious practices and have called out traditions that involve animal sacrifice or animal cruelty in any other way. It is yet to be accepted by the Parliament and is a major reason for the non-passing of the new bills.

The introduction of three Amendment Bills post the Prevention of Cruelty to Animals Act, 1960, demonstrates that the Parliament recognises the need for changes to the Act but the non-passing of any of these bills shows how the subject is not a priority. The Prevention of Cruelty to Animals Act deals with the life of living beings and the way they are treated, the injustices that they face, which means that this delay does not only show the ineffectiveness of the Parliament but it also demeans the value of a living organism's life.

JUDICIAL APPROACH

The Indian judiciary has time and again taken stands that reflect upon the conscience of the judicial system of the country. Even though the work of the judiciary is to implement the laws that are already laid down by the legislature, the Judiciary has, in multiple cases, recognised animal rights. The Supreme Court of India held that in a scenario where an animal has been used to shoot a movie, the makers of the film must ensure that the animal is well taken care of during the shooting. The Court laid down the need to obtain a certificate from the Animal Welfare Board of India to adhere to the prescribed rules. This demonstrated how the judicial system values the life of an animal and does not just consider it as property.

However, the adequacy of judicial interference in the matters of animal cruelty is still in question. During multiple cases, the courts have stood on the other side of the suit. For instance, the Madras High Court, on receipt of a case under Section 11 of the Prevention of Cruelty to Animals Act, wherein it was alleged that the chopping of the tails and ears of certain dog breeds amounts to cruelty, sided with the stand that chopping of dog ears and tails does not subject them to any sort of cruelty under the legislation and is the sole discretion of the owner of the dog.[5] In another instance where the issue of animal sacrifice in the name of religion arose, the Court gave a curious judgement by stating that it was crucial to uphold the faith and religious ceremonies of each religion and that animal sacrifice for religion does not amount to animal cruelty since it has been allowed

[5] Kennel Club of India (KCI) v. Union of India, AIR 2013 (NOC) (Supp) 1439 (Mad.).

by the legislation itself.[6] This is an indication of the fact that even though the Judiciary can exercise discretion in the interpretation of a case, the Judiciary cannot go beyond the word of the law and absolute justice cannot prevail until there is a change in the legislation itself.

CONCLUSION

Legislation is the centre of the system commanded by the sovereign. In its absence, concerned institutions are unable to function. These institutions are required to follow the word of the law, which is why it becomes pivotal for the legislation to be adequately equipped. The Prevention of Cruelty to Animals Act, 1960 lays down a wide range of instances that are contemplated as cruelty against animals but fail to take requisite steps for its prevention.

The Delhi High Court noted that despite the clear position of law in prohibiting cruelty to animals, including stray dogs, there is an increasing tendency among citizens to defy it. This means that the Parliament has succeeded to understand the vital factors of a living being that needs protection but has largely failed to implement the same. Mere prescription of law and assigning of rights is of no use until the same is being implemented in the court of law whenever such a case arises.

The punishment prescribed by law does not help the victim against whom the offence is committed, but it deters the same from happening in the future, which calls for stricter laws. The amended provisions included changes like the shift of the burden of proof onto the accused, prohibiting any kind of animal sacrifice, making such offences cognizable, and limiting the use of animals in the field of research. Making an offence cognizable means regarding that subject as one which needs immediate attention. A suffering living being should certainly be a priority, and thus, the offences under the PCA Act should be made cognizable. In a diverse country like India with multiple religious beliefs and traditions, there is a boatload of vengeance when it comes to making any amends, especially those which conflict with the pre-existing beliefs and cultures.

But these attempts to amend are futile if these draft bills just sit in cold storage. The Judiciary has, on numerous occasions, reflected upon the dire need for amendments alongside citizens who have attempted to fight using hashtags. Hence, the Parliament needs to pierce through these cultural and supplementary barriers to ensure that the objectives of the Act are fulfilled and animals are well protected.

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[6] Varaaki v. Union of India and others, Writ Petition (C) No. 689 of 2015.

A Critique on the Implications of Counter-Guarantee vis-à-vis Bank Guarantee and Letter of Credit

By *Samrudh Kopparam*[1]

ABSTRACT

With the emergence of the COVID-19 pandemic, the entire world went into lockdowns which immensely impacted the global economy. To recuperate from this impact and 'rebuild' the global economy, global cooperation, collaboration, and international trade is of the essence. At times like these, transactional security becomes pivotal to bring in foreign investment and integrate a sense of financial security and stability. Consequently, innovative financial and negotiable instruments become rampant. Thus, it becomes crucial to understand the implications of such sources of finance. This paper will critically analyse Bank Guarantees and Letters of Credit when a provision of counter-guarantee is provided. We aim to understand the elevated scope of these financial and negotiable instruments, implications of such instruments, and lastly, the inadequacy that arises to conclude by substantiating the necessity of a counter-guarantee.

Keywords: Counter-Guarantee, Bank Guarantee, Independence, Fraud, Irretrievable Injustice.

INTRODUCTION

In the aftermath of the COVID-19 pandemic, the entire world is facing a severe economic and financial gnaw. India remains indifferent to these consequences and is riddled with a massive unemployment crisis, alongside a contracting G.D.P. In pursuance of 'rebuilding' the country's economy, other than focusing on value-added products and augmenting domestic manufacturing, the government would seek to engage in foreign collaboration and increase its international trade. In these harsh and volatile business conditions wherein international transactions are often carried out with parties apart, barriers of language, and diverse interpretations, innovative instruments are utilized to provide payment security and airtight guarantee. Thus, it becomes essential to understand the implications of reliable sources of financing to protect and reduce the risks in business transactions.

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Through this paper, we analyse the provision of 'counter-guarantee in two such innovative instruments, i.e., bank guarantee and letter of credit. The former is considered the 'life-blood of domestic and international trade. The bank binds itself to pay unequivocally without demur to the beneficiary[2]. Despite being nascent in its applicability, the latter has crept into day-to-day international transactions as it carries an immediate legal effect and is necessary with the increased complexity of trade.[3]. The provision of a counter-guarantee plays a critical role in expanding the scope of the aforementioned instruments. This paper critically analyses the extent of the scope and parties' legal position in a counter-guarantee in Chapter I. We aim to understand Chapter II's 'common' implications that arise from this increase of scope. Lastly, we juxtapose the common inadequacies derived from both the instruments in Chapter III to conclude by substantiating our claim that a counter-guarantee is necessary for the contemporary context to reduce the risks in business transactions.

LEGAL POSITION OF PARTIES IN A COUNTER-GUARANTEE

To weigh down the parties' legal position in a counter-guarantee vis-à-vis bank guarantee, let us first briefly examine the working of a bank guarantee. Essentially, a contract of guarantee is governed under section 126 ("S.126") of the Indian Contract Act, 1872[4] to provide security to the creditor in the form of a promise by the surety in case of default by the principal debtor[5]. Bank guarantees work on this principle; however, they become inherently peculiar as it is to a certain degree an absolute undertaking to pay the amount whenever demanded by the guarantee-holder without due assertion on their relationship. Subsequently, making it the backbone of international commerce and attracting litigation due to abusive or unfair callings.[6]. In this regard, a 'counter-guarantee provision is instituted for the protection of the original guarantor. When a counter-guarantee is integrated into a bank guarantee, a four-party arrangement arises that gives effect to two back-to-back demand guarantees involving two different banking or financial institutions[7]. A bank (usually referred to as 'counter guarantor') instructs a second bank (the 'guarantor') to issue a demand guarantee in favour of a 'beneficiary.' The second bank is guaranteed compensation

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[2] Turkic, M., Bank demand guarantee and standby letter of credit as collaterals in international trading operations, 4 INTERNATIONAL JOURNAL OF MANAGEMENT, I.T. AND ENGINEERING 272, 274 (2014).
[3] I*d.* 272.
[4] Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, § 126.
[5] Sankalp Jain, "*Commercial Instruments: Bank Guarantee and Letter of Credit*," SSRN (2014), http://dx.doi.org/10.2139/ssrn.2460246.
[6] Ashok Luhar, Letter of Credit and Bank guarantee- Which is More Cost-Effective in Selected Indian Industries, 3 JOURNAL OF RESEARCH IN MANAGEMENT & TECHNOLOGY 19, 24 (2014).
[7] 3 DR. AVTAR SINGH, CONTRACTS & SPECIFIC RELIEF 606-984 (12th Ed, 2020).

against the counter-guarantor its payment to the beneficiary under its demand guarantee. Later, the guarantor provides a demand guarantee in the beneficiary's favour and pays the beneficiary upon receipt of a compliant demand.[8] To simplify the process, a counter-guarantee is an independent undertaking by a bank (counter-guarantor) in the country of the principal debtor in favour of a local bank (guarantor) in the beneficiary's country. It is important to note that the beneficiary himself does not receive the guarantee 'directly.' Rather, the local bank guarantees payment on first demand.

ELUCIDATING THE LEGAL POSITION OF THE FOUR-PARTY AGREEMENT

From the aforementioned discussion, it can be established that the 'real' guarantor remains the banks and financial institutions of the beneficiary's jurisdiction (the 'reissuing bank')[9]. In contrast, the bank in the applicant's jurisdiction plays the role of a counter-guarantor. In this manner, a guaranteed contract relationship is constituted, as the beneficiary is reimbursed based on the underlying transaction by the primary guarantee. When we closely examine the relationship between the counter-guarantor and the guarantor, there emerge two inter-linked. However, independent relationships - one of an agency relationship and another bearing qualities of an 'indemnity.' In the former case, the guarantor acts in a dual capacity while instructing the issuance of a guarantee.[10]I.e., as a principal between himself and the beneficiary and as an 'agent' between himself and the counter-guarantor. This contended in *Bank Melli Iran v. Barclays Bank.*[11]The confirming bank acted as a principal towards the beneficiary while acting as an agent towards the counter-guarantor. The conundrum was resolved by denoting this relationship as a 'mandate' accorded by the International Chamber of Commerce (I.C.C.) uniform rules on-demand guarantee.[12]. In the latter case, a counter-guarantee like a primary guarantee takes effect on its terms. This was duly laid down in the landmark judgment of *Mitsubishi v. Gulf Bank.*[13], wherein It was maintained that the counter-guarantee is independent not only of the underlying contract between the beneficiary and the principal but also of the primary guarantee. Thus, if the counter-

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[8] Thomson Reuters, "*Glossary- Counter Guarantee*," U.K.PRACTICAL LAW, https://uk.practicallaw.thomsonreuters.com/counterguarantee

[9] Mohd. Yasin Wani & Rais Ahmed Khasi, A Legal Perspective of Bank Guarantee System in India, 3 INTERNATIONAL JOURNAL OF RESEARCH IN COMMERCE & MANAGEMENT 163, 165 (2012).

[10] Chung-Hsin Hsu, The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit, 1 NTU L. REV. 1 15, 32(2006).

[11] Bank Melli Iran v. Barclays Bank Ltd., [1951] 2 Lloyd's Rep. 367 (U.K.).

[12] Chung-Hsin Hsu, The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit, 1 NTU L. REV. 1 18, 32(2006).

[13] Mitsubishi Heavy Industries Ltd. v. Gulf Bank K.S.C., [1996] EWCA Civ 1281 (U.K.).

guarantor undertakes to reimburse the guarantee without receiving a complying demand, it would give rise to a contract of indemnity as defined under S.124[14] of the Indian Contract Act, 1872.

It is also important to note that apart from the underlying contract, there are three significant relationships involved in a four-party transaction, i.e., between the beneficiary and the guarantor, the principal and the counter-guarantor, and the counter-guarantor and the guarantor. Additionally, we shall draw comparisons of these relationships vis-à-vis the Letter of Credit to advance a coherent discourse in Chapter III. Firstly, a Letter of Credit is a financial instrument that acts as a promissory note, i.e., it guarantees a buyer or borrower's payment to a beneficiary on time and in full[15]. In this regard, the first relationship between the beneficiary and the guarantor is similar to that between the beneficiary of actual credit and the confirming bank ('guarantor'), which adds confirmation to the Letter of Credit at the beneficiary's desire.[16]. The second relationship between the principal debtor and the counter-guarantor resembles an applicant for a standby credit and the issuer. This can be examined through the case of *Re. Twist Cap, Inc*[17].; wherein it was held that when the applicant secures a standby credit, an indirect preference will occur to benefit the unsecured beneficiary. Thus, the principal party's insolvency risk is shifted to the issuer[18]. Lastly, to understand the legal position and relationship between the guarantor and the counter-guarantor, we shall examine the case of *Turkiye Is Bankasi A.S. v. Bank of China*[19]. Due to the similarity of the object in primary and counter-guarantee, it was held that they are to be governed by the same law system. However, it imposed severe implications[20] Those are discussed in Chapter II. Illuminating on this relationship, firstly, we observe that although it was widely acknowledged that the appropriate law of a demand guarantee was unaffected by the governing law of the underlying contract[21], the case here was unique because the counter-guarantee was inextricably linked with the primary guarantee. Secondly, according to the doctrine of infection in a commercial context, the court shall assume that the same law shall govern even the guarantees. This has been reaffirmed

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[14] Indian Contract Act, 1872, § 124.
[15] He Bo, Legal Issues in Independent Guarantee Businesses in International Trade, 6 CHINA LEGAL SCI. 143, 151 (2018).
[16] Chung-Hsin Hsu, The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit, 1 NTU L. REV. 1 29, 32(2006).
[17] Re. Twist Cap, 1 B.R. 284 (Bankr. M.D. Fla. 1979) (U.S.A.).
[18] It is important to note that the Issuing bank resides in the Applicant's country.
[19] Turkiye Is Bankasi As v Bank of China, [1997] EWCA Civ 2649 (UK).
[20] The implications discussed in Chapter II relate to the 'Independence Principle' or the Autonomy Principle. The Autonomy Principle holds that each contracting party is independent and undertakes its commercial obligation governed by mutually accepted law.
[21] James J Mayers, et al., Illustrative Forms of Performance Guarantee and Counter Guarantee Security for International Construction Projects, 20 INT'L BUS. LAW. 243, 253 (1992).

in the case of *National Building Co. v. A.M Rasool Co.*[22]. Furthermore, taking aid of the *Broken Hill case.*[23]

The court inferred beyond reasonable doubt that the parties intended the counter-guarantee to be governed by the same law as the primary guarantee. This inference was drawn by observing that the guarantor took no greater risk than the solvency of the counter-guarantor, and the reimbursement was reissued to the same liability.[24]. Another vital precedent was set in *Bank of Baroda v. Vysya Bank*[25] which held that if the same law system did not govern the contract between the counter-guarantor and guarantor, it would lead to inconsistencies. Consequently, the applicable law of the counter-guarantee is the law of the guarantee, thereby preserving the independence principle.

IMPLICATIONS OF A COUNTER-GUARANTEE

Now that the relationship between the parties and their legal liability has been established, we can understand the common implications posed by a counter-guarantee provision.

A. Distortion of the Independence Principle in Counter-Guarantee

By analysing the relationship between the parties in a four-party arrangement, we can observe that each party is correlated to such an extent that the existence is only possible through the existence of another.[26] However, according to the autonomy or independence principle, each contracting party is independent and has commercial obligations. This can be observed in a recent judgment by the Delhi High Court. It was held that a counter-guarantee is an independent contract, separate from its underlying transaction.[27] Firstly, it was examined that the standard 'independence' principle that applies to the relationship between the guarantee and the underlying contract cannot be concretely adopted to the relationship between the counter-guarantee and the guarantee because the guarantor bears duties derived from a mandate,[28] i.e., the counter-guarantee and the

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[22] National Building Construction Corporation Limited v. A.M. Rasool Construction and Engineering Services Pvt. Ltd., 2012 S.C.C. OnLine Del 1455 (India).
[23] The Broken Hill Proprietary Co. Ltd. & Anr v. The Valuer-General of New South Wales, [1969] WLR 379
[24] Dr. Athira P.S, et al., A Critical Appraisal of the Role of Bank Guarantees in Transnational Sales - An Indian Perspective, Ph.D. Dist. NUALS, 35, 93 (2020).
[25] Bank of Baroda v. ING Vysya Bank Ltd., 2014 S.C.C. OnLine Kar 12699 (India).
[26] Grace Longwa Kayembe, The Fraud Exception in Bank Guarantee, Master's thesis, University of Cape Town 17, 79 (2014).
[27] L&S Attorneys, "*Counter-guarantee is an independent contract, separate from its underlying contract*," LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (2017), https://www.lakshmisri.com/newsroom/news-briefings/counter-guarantee-is-an-independent-contract-separate-from-its-underlying-contract/.
[28] Chung-Hsin Hsu, The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit, 1 NTU L. REV. 1 19, 32(2006).

guarantee are restricted by their respective context and do not need to coincide with each other. Furthermore, independence is also manifested in the context of expiry. This has been duly upheld in the case of *Helm Dungemittel GMBH v. S.T.C. India, Ltd.*[29] The court opinionated that the expiration of the letter of guarantee does not automatically lead to the expiration of the counter-guarantee. The inconsistency arises with the court's contention of viewing the parties to be applicable under the same law. This aspect was raised in *BHEL v. Electricity Generation Inc.*[30] The court opinionated that if the letter of guarantee stipulates an arbitration clause while the counter-guarantee does not, the dispute based on the letter of guarantee shall be subject to arbitration jurisdiction and the dispute based on the counter-guarantee the court jurisdiction. Therefore, imposing conflicted ramifications vis-à-vis exclusive territorial jurisdiction in commercial contracts.

B. Narrow Scope of Judicial Intervention in Enforcing a Counter-Guarantee

There is immense stress on 'independence' to counter-guarantee as it performs the role of risk distribution to achieve its purpose. Firstly, there is a shift in the burden of litigation, and the beneficiary can immediately have the necessary funds by submitting a complying demand.[31] Secondly, it shifts the burden of proof and the risk of currency fluctuation. Most importantly, it shifts the form of litigation in an international transaction. Therefore, to achieve an equitable relationship, there must be minimal external interference to the agreement. The Supreme Court also laid this in *United Commercial Bank v Bank of India.*[32] That courts should not interfere executively in such contracts since doing so may cause delays and disrupt the transaction process. However, there are certain exceptions wherein such intervention becomes necessary, i.e., fraud and irretrievable injustice cases. In *Texmaco Ltd. v. State Bank of India*[33], the Court held that in the presence of *"fraus omnia corrumpit,"* i.e., fraud corrupts everything, the bank does not have to make payments payment where a fraudulent beneficiary presents documents. Indian Courts, however, impose a high standard of proof in granting such injunctions.[34] Through this approach, a twin-fold objective is achieved; firstly, it discourages the principal from making false claims about the presence of fraud and maintains the efficacy of the demand guarantee as a financial instrument.[35]

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[29] State Trading Corporation of India Ltd. v. Helm Dungemittel GMBH, 2016 SCC OnLine Del 4455 (India).
[30] Bharat Heavy Electricals Limited v. Electricity Generation Incorporation, 2017 S.C.C. OnLine Del 11256 (India).
[31] Dr. Athira P.S, et al., A Critical Appraisal of the Role of Bank Guarantees in Transnational Sales - An Indian Perspective, Ph.D. Dist. NUALS 25, 93 (2020).
[32] United Commercial Bank vs. Bank of India and Others, 1981 S.C.R. (3) 300 (India).
[33] Texmaco Ltd. v. State Bank of India, 1978 S.C.C. OnLine Cal 140.
[34] Akshay Anurag, "*Bank Guarantee and Judicial Intervention,*" MANUPATRA (2018), http://docs.manupatra.in/newsline/articles/Upload/1A60C2E6-874F-4655-8821-CA4915F9D4F6.-%20banking.pdf.
[35] Grace Longwa Kayembe, The Fraud Exception in Bank Guarantee, Master's thesis, University of Cape Town 52, 79 (2014).

The scope of the fraud rule was discussed in *Vinitec Electronics Pvt. v. H.C.L. Infosystems Ltd*[36], wherein the Supreme Court remarked that the bank could pursue redressal when it is apparent that the documents produced by the beneficiary for pursuing enforceability is fraudulent or unlawfully obtained, and where the 'fraud' occurs in the underlying transaction by either party.[37] Furthermore, in the case of *Ross Exports v Tartan Infomark Ltd.*[38], it was held that the standard of proof is dependent on the facts in their entirety, and it is essential for the 'fraud' to vitiate the underlying transaction entirely.

The courts may also intervene in the encashment of guarantee when there is a *prima facie* irretrievable harm or injustice to one of the parties. The fundamental requirement in this regard is that the ensuing irretrievable harm or injustice must be such that the guarantor cannot indemnify themselves. It must also be demonstrated to the court's satisfaction that the amount could not be recovered from the recipient through restitution.[39] Furthermore, the Apex Court in *U.P. State Sugar Corp. v. Sumac International*[40] Held that the extent of the irretrievable nature should transcend the fundamental stipulations of the guarantee and adversely affect the commercial agreement. The exception plays a significant role when the parties to contract restrained by an internal adjudicative mechanism (like arbitration) attempt to frustrate the adjudication results to encash the guarantee. This intervention to over-arch the adjudication procedure with a 'mala fide' motive to inflict injury to the opposing party draws the exception of irretrievable injustice.

ANALYZING THE INADEQUACIES OF A COUNTER-GUARANTEE

After analysing the broad implications of a counter-guarantee provision common to Bank Guarantees and Letters of Credit, we observe quite a few common inadequacies. Unlike other economically advanced countries, India does not follow the I.C.C. Uniform Rules for Demand Guarantee (URDG)[41] i.e., a set of voluntary contractual rules standardizing international banking transactions. The URDG 758, in particular, regularizes the banking practice on-demand guarantees and counter-guarantees.[42] This inconsistency may lead to conflicts due to the difference in 'rules' and governing laws between the parties. For instance, I.C.C. regulations hold that the counter-

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[36] Vitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544 (India).
[37] Dr. Athira P.S, et al., A Critical Appraisal of the Role of Bank Guarantees in Transnational Sales - An Indian Perspective, Ph.D. Dist. NUALS 49, 93 (2020).
[38] Ross Exports International (P) Ltd. v. Tartan Infomark Ltd., 2002 S.C.C. OnLine Del 91 (India).
[39] Rada Postolache, The Banking Counter-Guarantee- Juridical Regime, 4 EIRP PROCEEDINGS 64, 76 (2010).
[40] U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 (India).
[41] Uniform Rules for Demand Guarantees, International Chambers of Commerce (I.C.C.) Publication No. 758 (2010).
[42] Mohd. Yasin Wani & Rais Ahmed Khasi, A Legal Perspective of Bank Guarantee System in India, 3 INTERNATIONAL JOURNAL OF RESEARCH IN COMMERCE & MANAGEMENT 164, 165 (2012).

guarantee terminates three years after the issuing date when time is not of the essence or not explicitly mentioned. On the other hand, in India, the guarantees are governed by the Limitation Act, 1963.[43] In cases wherein the government is the beneficiary, the expiry date extends to 30 years. Another inadequacy that has sparked controversy is the impact of the Doctrine of Strict Compliance within these instruments.[44] The counter-guarantors obligation against the guarantor is to pay only against an excellent conforming demand, i.e., there arises no payment if the documents presented do not conform to the text of the bank guarantee. As the Indian regime does not follow the ICC URDG, the 'degree of compliance' has remained ambiguous, asserting a more significant 'duty of care upon the guarantor.[45] This arises as if no strict review is conducted when the guarantor makes payment upon the request to the beneficiary, the beneficiary may file malicious claims, which will bring irretrievable damage to the applicant.[46] Thus, we can contend that the courts, when adjudicating these cases, must take an open-minded approach and review if 'substantial' compliance is met.

Another fallacy in the counter-guarantee provision is the inability to combat shell companies.[47] It has been observed that after encashment of the guarantee, these companies would initiate insolvency proceedings and set off their contractual obligations.[48] Furthermore, the Reserve Bank of India's (R.B.I.) recent master circular allows such corporations to beguile themselves into a false sense of security by commencing insolvency procedures.[49] This further contradicts the "Rule of Gibbs" established in *Anthony Gibbs v. La Société Industrielle.*[50] The Gibbs rule is widely known for its legal application in safeguarding creditors' rights in transnational dealings and comfort the local lenders in a counter-guarantee. The Rule holds that foreign insolvency proceedings cannot merely discharge a debt governed by law. Thus, such a reform exacerbates the issues of 'set-off' clauses and perpetuates the inequitable relationship between the parties.

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[43] The Limitation Act, 1963, No. 36, Acts of Parliament, 1963.

[44] Michelle Kelly-Louw, The Doctrine of Strict Compliance in the context of demand guarantees. 1 COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 85, 129 (2016).

[45] *Id.* 90.

[46] *Id.* 96.

[47] Shell firms do not engage in active commercial activities. However, they are set up to fulfill specific corporate goals such as minimizing tax liabilities, protecting a corporation from legal ramifications, etc.

[48] Linklaters, *No side-stepping the rule in Gibbs,* THE LINKLATERS BLOG (2020), https://www.linklaters.com/en/insights/publications/insolvency-bitesize/insolvency-bitesize_march-2019/fancy-footwork.

[49] Devendra Mehta, *An urgent need for a cross-border insolvency framework,* THE ECONOMIC TIMES (2020), https://economictimes.indiatimes.com/news/economy/policy/view-an-urgent-need-for-a-cross-border-insolvency-framework/articleshow/79529444.cms?from=mdr.

[50] Antony Gibbs & Sons v. La Societe Industrielle Et Commerciale Des Metaux, 25 Q.B.D. 399 (UK).

CONCLUSION

The primary objective of these innovative instruments is to give security for the due performance of the underlying commercial transaction. However, through this paper, we have observed the myriad lacunae present that can deter the purpose and tip the scales of an equitable relationship. To overcome the inadequacies and international transactions are carried out smoothly, India must adopt a uniform regime like the first-world countries. This would guarantee minimal jurisdictional tussle during disputes, forum shopping, abuse of interpretative contrariety, and contravention of foundational legal principles.

The implications have been analysed throughout this paper to further our claim that the counter-guarantee provision is necessary. However, to make it truly effective, we recommend 'regulatory' measures for smoother functioning. Firstly, to mitigate the risks of being abused by 'shell companies,' a counter-guarantee may be provided after duly assessing the client's financial standing and past transactional record vis-a-vis such guarantees. After evaluating the same, they may lay down maximum monetary limits up to which they shall 'indemnify' or guarantee the beneficiary, consequently reducing transactional risks and propensity to guarantee. Secondly, to adhere to the documentary compliance, there shall be a higher standard of due diligence during the issuance of a guarantee that two signatures must attest in triplicate copies.[51] Lastly, it has been observed that the independence principle tips the scales by giving security to the beneficiary by the bank, but no such provision is available for the buyer (principal); thus, the scope of judicial intervention must be made lucid to achieve a genuinely equitable relationship.

[51] Dr. Athira P.S, et al., A Critical Appraisal of the Role of Bank Guarantees in Transnational Sales - An Indian Perspective, Ph.D. Dist. NUALS 65, 93 (2020).

Whether the Reserve Bank of India is Independent Enough?

By *Sanskriti Shrivastava*[1]

INTRODUCTION

Without a doubt, since the very beginning of the Reserve Bank of India (**"RBI"**), the central bank of our country has worked at par with any of the leading central banks around the world. Unlike any other center-owned body, RBI is fortunate enough to hold independence on a wide range of matters like the function to control and manage the monetary liquidity, prince stability, exchange rate stability, and on a wider note, the financial stability as well. But, in between such quality of work, when the news reports headlines like, "Mr. Patel resigns over government pressure on the bank," it's a great misfortune for the country's economy and a strong signal of loss of autonomy of RBI.

If we look at the post-independence period, the RBI has ample power. However, the picture-perfect autonym of RBI has become an illusion these days, where the Central Government is making continuous efforts to dilute the autonomy of RBI and interfering in its affair of business, specifically by way of Section 7, The RBI Act, 1935.

WHY AUTONOMY OF RBI IS IMPORTANT?

This may be categorized on primarily two reasons:-

a) **The central bank is not a department of executive function of the government:** India follows a democracy-based form of government and the Constitution of India or any other related law does not prescribe any specific educational qualification for a person to be eligible to be a member of the Parliament. However, the functions of RBI are complex and thus, require a field expert to be properly handled. As a matter of fact, our Parliament is not competent to understand the technicalities of a complex institution like the Central Bank. Therefore, RBI is not an institution of the government. Rather, it is an institution that derives its authority from specific legislation, i.e., The Reserve Bank of India Act.

b) **The decision making shall be free from considering political windfalls:** An independent RBI must take its decisions for macroeconomic stability without any need to consider politically led agendas. The words of Dr. Viral Acharya (Dy. Governor) indicate

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the very basic rift between RBI and the Government. The former focuses on long-term goals, and the latter is generally motivated by short-term goals.[2]

SECTION 7 OF THE RBI ACT: AN EXTREME STEP

Under Section 7 (1), "*the central government may….give such directions to the Bank as it may…consider necessary in the public interest.*"[3] This provision was not in place since the inception of the Act. The Act was later amended in 1949 to empower the Centre to issue directions to the central bank in the public interest.[4] The clause was drafted after combining the provisions of Section 4(1) of the Bank of England Act, 1946[5], and Section 5(g) of the Commonwealth Bank of Australia Act, 1945. The intent behind such addition was clear, "*The Governor considered it desirable to make it clear in the Act itself that when the Government decided to act against the advice of the Governor, they took the responsibility for the action they wished to force on the Bank, although it was hoped that occasions for the exercise of such powers will be few.*"[6]

If we look at another perspective as to why such a provision was incorporated, the answer lies in the simple theory that mostly, the Government is blamed for any financial loss to the country. Thus, the one held accountable shall be given some powers too.

Section 7 is the Government's way to trespass on the Central Bank's autonomy. Both the critics and supports of Section 7 say that it is an extraordinary provision. However, the power to decide whether to use this provision or not rests with the Government only. Thus, no question of 'double check' arises.

THE RIFT BETWEEN THE CENTRAL BANK AND THE GOVERNMENT-INVOKING SECTION 7 OF THE RBI ACT

Section 7 of the RBI was never invoked, even when India faced various financial black clouds like the Liberalization, Privatization, and Globalization policy in 1991 or 2008 global crises. However, its use in the recent past has made the economists and other field experts active to discuss and

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[2] Viral V. Acharya, *On the importance of independent Regulatory Institutions: the case study of Central Bank,* Lecture delivered as the A.D. Shroff Memorial Lecture, Mumbai on October 26, 2018.
[3] The Reserve Bank of India Act, 1934, §7, No 2 of Acts of Parliament, 1934.
[4] II G. Balachandran, The History of Reserve Bank of India (1998).
[5] The Bank of England Act, §4(1), 1946.
[6] I S.L.N.Simha, The History of Reserve Bank of India (1970).

criticize the action. This action of the Government is majorly related to the resignation of the 24TH Governor of the Reserve Bank of India, Dr. Urjit Patel.

Prime Minister Modi-led Government has come into scrutiny after announcing demonetization on 8th November 2016. Just 2 months before this big step, Dr Urjit Patel took charge as RBI's Governor after Mr. Raghuram Rajan. He was the head of the central board of RBI that approved demonetization. His silent approval of the demonetization scheme attracted criticism from many renounced economists, including Mr Y. Venugopal Reddy. He took charge as RBI's Governor from 2003 to 2008. After just a few months, when the country was still struggling to come out of the impact of demonetization, the government strongly pushed for getting a higher dividend from the Central Bank's surplus earned through operations. Meanwhile, the state-run Punjab National Bank's scam took the headlines. The then Finance Minister, Mr Arun Jaitley, took no time to blame RBI's inactiveness and the government's displeasure by the way the RBI handled the whole matter. He also made some very strong statements.

That was probably the first time when the then RBI Governor, Mr Urjit Patel, strongly supported the role of RBI and mentioned in a public meeting that RBI had enough control over the private sector banks but certainly no control over the public sector banks.

It is pertinent to note here that the Government very clearly stated that it had not invoked Section 7 of the RBI Act but rather initiated 'Consultation' with RBI. There are three instances in total which step by step lead to invoking of such 'consultation':

i. RBI's February 12th Circular was challenged in Allahabad High Court. After the Allahabad High Court's decision in August, the government issued a letter to the RBI governor seeking his opinion on an exemption for power companies with respect to the 12th February circular.

ii. Further, the government, on 10th October, sought the governor's views on using RBI's capital reserves for providing liquidity.

iii. The third letter was regarding the Prompt Corrective Action **"PCA"** (PCA is used as a tool to prevent weak banks from getting weaker).

iv. Apart from this, the Central Bank and the Central Government do not share the same footing over other matters like classification of Non-Performing Assets and independent regulator for payment system under an amendment proposed under Payment and Settlement System Act, 2007.

CONCLUSION AND WAY FORWARD

The combined reading of legal provisions and what lead to Dr. Urjit Patel's resignation gives an idea that the legislative framework does not only empower the Government to issue directions, but it also empowers it to supersede the governance system of RBI and other regulators. Section 7 gives unambiguous power to the Government to use its power in the public interest whenever it deems fit. However, such exercise of power stands no tests of law or reasonable criteria in reality. Rather, it holds that a difference of opinion between the Central Bank and the Government can be a reason for invoking such an extreme provision.

Therefore, two goals need to be balanced at this point. First, the central bank must be kept independent from political infringement. A welcome step in this regard is the establishment of the Monitory Policy Committee; and the second, accountability of the economic system.

The above two goals are somewhat in conflict with each other as independence must indeed be established, but at the same time, the role of the Ministry of Finance cannot be ignored. That is to say, somewhere or the other, both these institutions cannot work in complete isolation. Better communication and coordination are what is required.

The government's power to issue directions and change the constitution of the board is not a daily used provision. It must be used with extreme caution. Also, RBI should be given enough flexibility to function within the ambit of its constraints.

To conclude, the legislature never intended to grant overlapping powers to both institutions. Rather, it demands improved coordination and communication between the relevant government department and RBI.

Period Leaves for Women: Is it Violation of Right to Equality?

By *Tejaswini Kakade*[1]

In a significant move, Zomato, a food delivery company in India has granted 10 days of 'Period leave' in a year to women and transgender. Apart from Zomato, three other organisations, i.e., Culture Machine, Gozoop, and FlyMyBiz, have introduced period leave for their employees. Bihar Government in 1992 has allowed period leave of 2 days in a month.[2] Across the world, several companies like USA's Nike, UK's CoExists, and Australia's The Victorian Women's Trust have similar policies in place.

The Menstrual Benefit Bill, 2017, was introduced by Ninong Ering, a Lok Sabha MP, to legitimize the right to a menstrual leave for a period of 2 days. This bill also provided facilities at the workplace for women during menstruation. This bill was supposed to apply to only a few establishments and students from Class 8th onwards. The bill lacked a proper framework for implementation. Considering the present scenario, it has become a rising question whether period leaves need to be granted or not, and upon grant, would they be violative of equality of law.

Article 14 of the Indian Constitution states the Right to Equality. However, it does not state that all laws must be general in character and applicable universally[3]. In *M.G. Badappanavar v. the State of Karnataka*[4], Supreme Court stated, *"Equality is a basic feature of the Constitution of India and any treatment of equals unequally or un-equals as equals will be a violation of the basic structure of the Constitution of India".* Hence, Article 14 is qualified to make distinctions between the classes on reasonable grounds.

To determine this, the doctrine of reasonable classification is used, which consists of two factors.[5]-

- Classification on the foundation of intelligible differentia.
- The differentia must have a rational relation to the object which is to be achieved.

Male, Female, Transgender, and Non-binary genders are equal, not identical. Biologically and physically, they differ. However, these differences should not be the reason behind their unequal

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[2] Vrinda Aggarwal, *Leave to Bleed: A jurisprudence study of the policy of Menstrual Leaves* 8(1), The Journal of Indian Law and Society Blog, 2017
[3] Kedar Nath Bajoria v. State of West Bengal, AIR SC 404 (1953).
[4] M.G. Badappanavar v. the State of Karnataka, AIR SC 260 (2001).
[5] 1(1), M.P Jain, Indian Constitutional Law, Page. 980

treatment. Menstruation should not be regarded as solely a 'woman problem,' as it also affects trans men and non-binary people.

For centuries, Periods have been a victim of stigma prevailing in our society. Menstruation is marked as a sign of a girl entering womanhood, and in several parts of the world, it is kept hidden in the dark for primitive and regressive reasons, which does not have much of a place in current society.

An average girl starts her first menstrual cycle at the age of 12, which lasts for decades until menopause. With the start of menstruation, many young women go through several painful hormonal conditions and disorders such as Dysmenorrhea, Polycystic Ovary Syndrome, etc. These lead to heavy bleeding, painful cramps, nausea, body pain, etc. Going through menstruation is not optional. It is not a choice. Each body is different and perceives pain differently. During such times, rest is needed.

Expression of intelligible differentia emphasizes understanding the distinguishing factors present and determining whether they provide reasonable grounds or are arbitrary. In this situation, menstruators and non-menstruators are divided based on biology. Further, a Menstruator is classified into two categories, people with conditions or disorders and people who do not suffer through anything. This classification is not arbitrary but a human gesture of acceptance towards people with disorders.

The policy of period leave creates a differential treatment for menstruators and is based on the fact that they have substantially different conditions that need to be addressed and hence require differential treatment.

After the intelligible differentia is established, there should be a rational relation that is sought to be achieved by the statute or policies. The objective to be achieved here is to address such biological differences and understand the conditions and disorders which many of them face. There is a nexus between the menstruators who suffer through pain and granting leave for the same due to the unbearable pain without any economic consequences.

Article 15(3) of the Indian Constitution states about making special provisions for women and children. The purpose behind Article 15(3) is to eliminate the social and economic backwardness that centuries of oppression have done and empower this part of the society. Making policies for women is not unconstitutional on reasonable grounds. However, this policy of period leave recognizes the biological barriers which some women face, accepts the truth, and moves past the

stigma which surrounds it. These policies are a move towards progress as a society. These policies should be optional on the ground that if menstruators want, they can take a leave.

In a study by BMJ Open Journal,[6] 32,748 women aged between 15-45 were surveyed. This study noticed that 13.8%, i.e., 4514 women, reported that they stay absent from work during menstrual periods. 80.7%, i.e., 26,438 women, are present at work during menstruation. Further, an average loss of productivity of 33% resulted in a mean of 8.9 days of lost productivity per year due to being present. It was further recorded that 67.7%, i.e., 22,154 women wished for flexibility in their tasks and hours at school or work during menstruation. This study concluded that women lose their productivity during menstrual periods during being present than being absent at work or school. There is a need for alternatives to address this concern.

Apart from taking leave, the Work from Home alternative can also be implemented. This Covid-19 Pandemic has shown the entire world that one can stay home and get their work done. Instead of traveling by bus and trains for hours, going to the office, and stressing their bodies out, menstruators can stay home for a day and complete their work as per their schedule. The Labour class should also have the option of Period Leave without a pay cut, or else the very objective of this policy shall be futile.

Simply accepting this policy indicates that nobody should try to fight one's biology to prove their worth or capabilities.

Across the world, some countries do recognise Menstrual Leave. Japan has 12 days period of leave which was implemented in 1947. Indonesia implemented it in 2003, but it lacks proper implementation, and women labour are not paid if they take up this leave.[7] South Korea, Thailand, Taiwan, Cambodia, Zambia, and a few regions in China have similar policies. Italy was the first country in the European Union to consider giving Menstrual Leave, but it has not been enacted. A similar situation is prevalent in Russia.[8]

Another objective behind the granting of this leave is that it should not result in unequal treatment across workplaces.

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[6] Mark E Schoep et al., *Productivity loss due to menstruation-related symptoms: a nationwide cross-sectional survey among 32,748 women,* 9(6), BJM Open Journal, (2019).

[7] Vrinda Aggarwal, *Leave to Bleed: A jurisprudence study of the policy of Menstrual Leaves,* 8(1), The Journal of Indian Law and Society Blog, 2017

[8] *Ibid.*

The element of equality has been present ever since societies were formed, but during its nascent stages, society has been looked at from a man's perspective. Since societies are evolving, we also need to change that perspective and acclimate the viewpoint of everyone.

We need to redefine our society keeping everyone's experience in mind. When women's concerns are raised, negative assumptions and stereotypes related to them should not be reiterated. Society or any law does not have to treat women as 'other' and their needs as an 'exception'. The basic problem in ignoring biological differences is that both men and women are the creation of flesh but their attributes and representation are different. When we attempt to treat women like men, it leads to male-centred practice which leads to ignorance of women-related concerns.

As society is progressing, feminism is trying to remove the stigmas surrounding women. Here, several steps are being made to ensure that this issue has a more comprehensive global outreach. However, many workplaces are male-dominated areas where women want to keep pace with them to prove their equality and capability. Hence, some women avoid mentioning periods when they take leave, fearing it will deem them disabled.

Instead, workplaces should recognise everyone's hard work irrespective of their gender. To normalise this and to eliminate the fear which persists in the minds of menstruators, steps need to be taken under the Constitution of India to ensure their needs. Or else, it is like taking one step ahead to take two steps back.

Hence, lawmakers and society need to take into account everybody's point of view and needs into consideration while making policies for each. They need to ensure that they can pacify the needs of all groups.

Cross Border Insolvency under the Indian Regime: Necessity of Amending the Legislation post the Covid-19 Pandemic

By *Sharbani Kar*[1] *& Pratik Dash*[2]

This paper begins by discussing the impact of COVID-19 on Cross border Insolvency proceedings. The Model Law and its core principles are discussed with the adoption by the developing nations. Under Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016, India has a cross-border insolvency procedure. The said provisions are considered haste inclusion with no steps being taken for bilateral arrangements with countries and failure to imbibe the core principle of Model in the said provision. The paper further delves into the delayed approach of framing Cross border Insolvency report to consider the problems caused by the existing provisions and making recommendations for a draft provision after two years of commencement of the Code. The amendments are made to the current Code, more particularly, the Pre-packaged Insolvency Model for the MSMEs, wherein foreign creditors and resolution of foreign assets of a debtor find no place. The FDI influx vis-à-vis ranking made to the ease of doing business during the COVID-19 pandemic, which can be contributory factors for achieving the prime objectives of maximizing asset value and effectuating time-bound resolution. In view of these existing circumstances, the authors advocate for the necessity of implementing the extended pending Model Law framework for Cross Border Insolvency to attain the legislative objects.

KEYWORDS: UNCITRAL Model Law, Ease of doing business, Bilateral agreement, Letter of Credit, Covid-19

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INTRODUCTION

The world economy has shattered after the onset of the COVID-19 pandemic. It has wrecked the distribution systems and GDP across several jurisdictions, making it difficult for small, micro, and medium scale businesses. It has even halted large corporates and Multinationals. Even piling debts in the market and the improbability of recovery and realization of assets is a growing concern. Cross-border insolvency is a method of realizing the assets of debtors in different jurisdictions. It refers to the maximization of recovery of debts incurred at the behest of those investors/creditors hailing from different countries.

India has been one of the worst affected countries in this pandemic, and IBC is not a legislation piece that has been discussed as of late. The ideologies behind the Code were discussed and presented through specific published reports and framed committees such as Eradi,[3] Bankruptcy Law Reforms,[4] etc. Whilst the Model Law[5] was enacted in 1997 to address the issue of Cross border insolvency, Indian lawmakers have decided to adhere to it in recent times with notification of two dead pieces of Cross Border Insolvency provisions into IBC under Section 234 and 235. The problems faced in cross-border resolution remain unaddressed because of failure to create and enforce bilateral agreements viz reciprocal arrangements. It extends to creating balance in the enforcement of insolvency orders/awards and prioritization of domestic proceedings qua creditors.

However, it is pertinent to raise how long the Indian Legislation would do away with the enforcement of enacted provisions post-pandemic when the economy revives and bad debts need cautious resolutions.

THE MODEL LAW ON CROSS BORDER INSOLVENCY

The framing of Model Law was done keeping in mind four factors also referred to as principle that would give access, recognition, relief to a debtor of one country and further, would be extended with Cooperation and efficient coordination to resolve the debts. These principles were the watermarks for the legislations across the globe to create a domestic framework that would facilitate a time-bound resolution of debts accrued in international trade practices. The Model Law even provides for flexibility[6] and consistency to the national insolvency laws. These recommendations were ratified by

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[3] Eradi Committee Report, Laws Relating to Insolvency and Winding of Companies (2000).
[4] Bankruptcy Law Reforms Committee (BLRC) Report (2015).
[5] Model Law in Cross border Insolvency (1997).
[6] Article 6 of the UNCITRAL Model Law of Insolvency, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (last accessed 20th September, 2021).

44 countries instantly, including major developed countries such as United States, United Kingdom, etc. The Model Law was framed in an era that was devoid of technology and digitalization. It recognized both foreign and domestic insolvency proceedings inter alia public policy exceptions and flexibility[7] to include, vary provisions to suit domestic needs.

Countries have implemented exclusions that are far broader than those anticipated by the Model Law. The Model Law does not demand reciprocity, nor does it stipulate that a foreign representative wanting to use its services must have been appointed or foreign proceedings begun under the law of a State that has adopted it.[8]

INDIA'S APPROACH TOWARDS CROSS BORDER INSOLVENCY: TILL TODAY

Section 234 and 235: A Haste Inclusion devoid of Model Law principles:

Section 234 and Section 235 of the Insolvency and Bankruptcy Code, 2016, have been adopted in India. These provisions, however, have not yet been announced. By virtue of Section 234, subsection (1), the Central Government would enter into bilateral agreements with foreign countries to enforce the IBC-mandated Corporate Insolvency Resolution Process. By notification in the Official Gazette, the Central Government would direct the application of the Code's provisions in relation to the assets/property of Corporate or debtor, or guarantors who have incurred personal liability to the debtors in countries with whom India has reciprocal arrangements. However, it has failed to address the issues of reviving the assets of fugitives Like Vijay Mallya, Mehul Choksee, Nirav Modi, etc. as they still have assets spread in multiple jurisdictions. Section 235 of the Code deals with a letter of request to foreign courts by the NCLT and NCLAT for implementation of its orders over the assets of a Corporate Debtor whose insolvency resolution has been admitted in India.

These provisions are devoid of analysis and implications by the Draftsmen showcasing the major lacunae of the Code. The ambiguities range majorly in implementation of orders passed by the Adjudicating Authorities in foreign courts, cooperation ascertained to the letter of requests, reciprocal arrangements, etc. India's adoption of the New York Convention for the Enforcement of Arbitral Awards, 1958, sheds light on the country's readiness to reciprocity. Therefore, the Indian Legislators needed to understand that the enforcement of bankruptcy orders has far-reaching consequences,

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[7]Article 6, Part One. UNCITRAL Model Law on Cross-Border Insolvency, Chapter I. General provisions, UN publications, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.

[8]A Case to Cross the Border Beyond the UNCITRAL by Sudhaker Shukla and Kokila Jayaram https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf (last accessed 20th September, 2021).

considering the multiple numbers of stakeholders involved and, more particularly, the need to adhere to a time-bound resolution of assets.

Draft Report by the Central Government in 2018: A delayed approach to implementing Model Law

The Central Government has understood the complexity of Cross Border Insolvency after two years since implementing the Code.

The Draft Committee has appreciated the necessities of exclusive features of the Model Law with flexibility, public policy exceptions, mandatory and non-mandatory relief inter alia another such dynamic and progressive approach. The Draft Provisions have left a lot of detail to the Central Government and IBBI's subordinate law. To avoid confusion in the resolution of cross-border insolvencies, promulgations of rules/regulations must align with the Model Law's goal and be implemented promptly.

The Committee has even appreciated that implementing the Model Law would allow recognition of foreign proceedings and substantive relief. The Centre of Primary Interests (COMI), which states that if domestic courts conclude that the debtor's COMI is in a foreign nation, those foreign proceedings will be recognized as the main proceedings, was widely regarded as a necessity.

The draft introduces joint hearings for concurrent proceedings operating at different jurisdictions, promoting cooperation and preventing inconsistent judgments on the resolution process. It is difficult to understand why these provisions have not received the sanction of law. However, India had roaring cases of debts and debtors mushrooming in different countries, much before the pandemic.

Judicial Activism: Indian Judiciary's proactive approach for fair treatment

Indian judiciary has expanded its horizon beyond the black letter law. The resolution of Jet Airways in NCLAT is an example set apart. The NCLAT was hearing an appeal from orders and had partly set aside the impugned order passed by NCLT; so far, it related to the decline of request relating to ousting of jurisdiction of Dutch Court in having a parallel insolvency proceeding.[9] The NCLAT further went ahead to injunct creditors of the committee in discriminating against the Dutch creditor. The Resolution Professional was asked to enter into a Cross Insolvency Protocol with the Dutch Trustee Administrator.

[9] Company Appeal (AT) (Insolvency) No. 707 of 2019

The Dutch Supreme Court extended the principle of "Cooperation" of the UNCITRAL Model in Yukos Finance.[10] The arbitral award has granted foreign administrator permission to exercise its powers without depriving the legitimate claims of secured creditors in the Netherlands and the exercise of powers according to the law of the land where the insolvency proceedings were initiated.

Consolidation of insolvencies was made for the first time in the case of Videocon Industries with four foreign-based corporations by the NCLT Mumbai bench in February 2020. The Tribunal called into question IBC's extraterritoriality and procedure involved collating foreign subsidiaries' assets with those in India. It has once again demonstrated the need for similar regulations assets with those in India.[11]

In *SBI v. SEL Mfg., Bankruptcy Code granted co. Ltd., NCLT, Chandigarh recognition of main foreign proceedings* as India was treated as the centre of main interest by U.S. creditor in an application by the foreign debtor.

Amendments to the Insolvency Code amidst the global pandemic:

Apart from the significant suspension of the application sections, major reforms brought about by the Indian Government is an infusion of the package for the MSME, also known as pre-packaged insolvency process (PPIR), by significant amendment on 04th April 2021. It provided for the collaboration of the debtors and creditors in an informal agreement with 90 days of the resolution, unlike the convention CIRP. The Code's interpretation extended to the applicability of Part III to the debtors' guarantors. The resolution plan approval even doesn't discharge ipso facto their liability.[12]

The personal guarantee also extends to foreign creditors who have rendered their liabilities to the Corporate Debtor whose resolution process is carried out in India. Due to uncertainty in the implementation of Model Law, no mechanisms could be adopted to resolve the foreign assets. The Legislation should have taken a proactive approach in framing the entire law as MSMEs have creditors engaged in inter-country and inter-continental trade practices. However, most affected small-scale promoters have not been able to get a restructured debt. More particularly, when the game becomes the resolution of debts across borders, it becomes a mammoth task. The Micro and Small Enterprises Facilitation Council (MSEFC) has remained functionless in this global pandemic to redress cross-border debts.

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[10] Manish Arora and Raushan Kumar, India's tryst with cross-border insolvency law: How series of judicial pronouncements pave the way? (SCC Online Blog), April 16, 2021, https://www.scconline.com/blog/?p=247207.
[11] State Bank of India v. Videocon Industries Ltd., MA 2385/2019 in C.P.(IB)-02/MB/2018.
[12] Lalit Kumar Jain v. Union of India, 2021 SCC Online SC 396.

Foreign creditor's debt: yet unaddressed and unresolved post COVID-19

The methods resorted by the Government have still made the room dark for the foreign creditors who are yet on the verge of resorting to arbitration and mediation mechanisms. With the implementation of the Code, suspected tainted money under the Prevention of Money Laundering Act of 2002, and freezing of assets thereunder, the aforementioned act has suffered a significant setback. Foreign Exchange transactions that involve creditors in multiple jurisdictions fail to realize the debts on account of these money laundering proceedings. However, the benefits are to be reaped only if the law is at hand as a tool.

Foreign Banks have no option to enforce a security interest in Indian Law at their disposal. In greater measure, the chaos by pandemic has made the IBC's object viz. maximization of assets unfruitful for foreign creditors. Resolution professionals and Liquidators would face tough times to address claims and valuations in realizing assets across multiple countries. Foreign creditors are devoid of participation and voting rights in a COC meeting. Therefore, every major resolution seems ineffective, and revival is minimalistic post the pandemic unless the UNCITRAL Model Law is carved in as Law.

An out-of-court settlement mechanism initiated as a Pre-Pack mechanism would also preclude the foreign creditors from being part of the agreement entered with debtors.

Possible Impact on FDI and Ease of Doing Business in India post COVID-19:

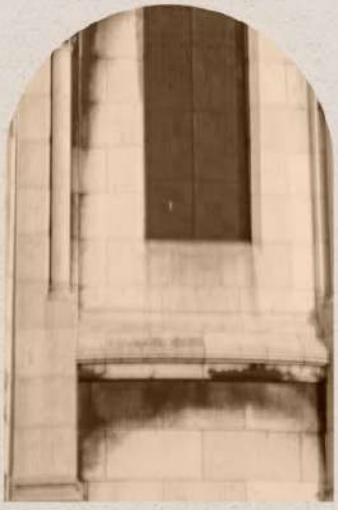
India has been certainly proactive in mapping out IBC as one of the catalysts to achieve the objectives of Foreign Investment and Ease of Doing Business. In World Bank's "Doing Business" 2020 Report, India has climbed 14 places to 63rd rank. Nevertheless, the positions are chaotic for all the countries for the next two years when the world is reeling under this pandemic. India is being faced with second and third phases to rot out with discrepancies in vaccine rolls. Cross border regime is warranted, which would otherwise have gains that are lower than fair value.

The FDI inflow has been a good reason to boast for India, with the investments being made to the digital sector while the global foreign equity flow has come to a record low. Cross-border mergers and acquisitions, such as Facebook's acquisition of a 9.9% share in Reliance Jio platforms, have added icing to the cake. To create a business environment, the legislators need to buckle up for addressing credit lines across borders. The faith of creditors in ease of business would also rely on resolving and restructuring an accrued debt.

CONCLUSION

Therefore, it is of utmost importance to present the draft bill for Cross border Insolvency in India before both the Houses of Parliament and give it Presidential permission without any hesitation as the UNCITRAL Model Law has addressed the needs of many nations in providing a robust framework for Insolvency courts to restructure the debts. The business environment in India is getting a progressive change, which would further accelerate post the pandemic and needs time-bound resolution with the removal of all the anomalies which would hinder in realizing the objects of IBC. Following the pandemic, a precise framework in cross-border insolvency based on model law's core principles is an immediate necessity.

Infographics



THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

The amendments introduced are:

Section 36 of the Act has been extended to include that the court shall stay the award unconditionally, in cases, where, it is prima facie made out that the

(a) the arbitration agreement or contract which is the basis of the award

(b) the making of the award, was induced or effected by fraud or corruption. This is deemed effective from 23rd October, 2015.

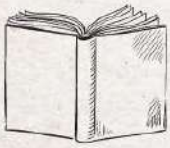
Section 43J of the Act has been substituted and the new section states that the qualifications, experience and norms for accreditation of arbitrators shall be specified by the regulations.

Schedule VIII of the Act has been omitted.

THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

The Medical Termination of Pregnancy (Amendment) Act, 2021 received President's assent On March 25, 2021, it will modify the Medical Termination of Pregnancy Act, 1971.
The significant amendments made to the act are-

Increasing the upper gestation limit from 20 to 24 weeks for special categories of women, including survivors of rape, victims of incest and other vulnerable women (differently abled women, minors, among others).



The opinion of one provider needed for the termination of pregnancy up to 20 weeks of gestation. Requirement of the opinion of two providers for the termination of pregnancy from 20-24 weeks of gestation.

Upper gestation limit to not apply in cases of substantial foetal abnormalities diagnosed by a Medical Board.

Confidentiality clause - The name and other particulars of a woman whose pregnancy has been terminated cannot be revealed except to a person authorised by law.

Extended MTP services under the failure of contraceptive clause to unmarried women to provide access to safe abortion based on a woman's choice, irrespective of marital status.

PM CARES FUND

The PM-CARES fund was set up in 2020, as an emergency measure for disaster relief during the coronavirus pandemic. The PMO – which manages the fund – has refused to divulge information under the RTI Act; claiming that the fund is not a "public authority" under the Act.

According to the PM cares website 3076.62 Crore was collected under the Fund for 2019-20.

It received "voluntary contributions" from various Govt. agencies, armed forces, and PSUs, here are a few who contributed a lot to the fund-

- Indian Air Force - Rs. 29.18 Crores
- Indian Navy – Rs. 16.77 Crores
- Indian Army - Rs. 157.71 Crores
- All 7 Public Sector Banks and the RBI – Rs. 204.75 Crores
- Central Educational Institutions - From the staff salaries, numerous centrally run educational institutions contributed Rs 21.81 crore.
- PSU's - About 101 PSUs have contributed Rs 154.70 crore from the staff salaries to the fund and 98 others contributed a total of Rs 2,422.87 crore from their CSR funds.

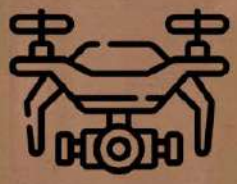
- The 3100 Crore collected by the fund, according to the PMO were allegedly allocated to the following activities-
- Rs. 2000 Crore: For supply of 50,000 'Made-in India' ventilators to Government Hospitals run by Centre/States/UTs
- Rs. 1000 Crore: For care of migrant labourers (funds allotted to State/UT Govts.)
- Rs. 100 Crore: For vaccine development

THE DRONE RULES, 2021

·The strict requirements under the Prior Rules like certificate of conformation, certificate of maintenance, operator permits, import clearance, authorization of R&D etc., have been abolished under the Rules.

The Rules are based on the principles of "trust, self-certification and non-intrusive monitoring" by reducing the extent of regulatory control.

The aim of the Rules is to create a 'digital sky platform' (**"The Platform"**) which is a business-friendly single-window online system, with minimum human interference, where most of the permissions will be self-generated.



Coverage of drones under Drone Rules, 2021 has been increased from 300 kg to 500 kg. This will cover drone taxis also.

Type Certificate is required only when a drone is to be operated in India. Importing and manufacturing drones purely for exports are exempt from type certification and unique identification number.

Drone corridors will be developed for cargo deliveries.

The Central Government on 25th August 2021 has promulgated liberalised 'The Drone Rules, 2021' ("the Rules"), replacing the erstwhile Unmanned Aircraft System Rules 2021 ("Prior Rules"), to regulate the use and operation of Drones or Unmanned Aerial System ("UAS") in India.

THE FARM BILLS, 2020

If farm produce is sold outside APMC mandis, these will stop functioning

What will be the future of government electronic trading portal like e-NAM

DOUBTS

Procurement at Minimum Support Price will stop

THE FARMERS (EMPOWERMENT AND PROTECTION) AGREEMENT OF PRICE ASSURANCE AND FARM SERVICES BILL, 2020

The farmer will have full power in the contract to fix a sale price of his choice for the produce. They will receive a payment within a maximum of 3 days.

After signing the contract, farmer will not have to seek out traders. The purchasing consumer will pick up the produce directly from the farm

CLARIFICATION

10000 Farmer Producer organizations are being formed throughout the country. These FPOs will bring together small farmers and work to ensure remunerative pricing for farm produce

In case of dispute, there will be no need to go to court repeatedly. There will be a local dispute redressal mechanism.

THE FARM BILLS, 2020

If farm produce is sold outside APMC mandis, these will stop functioning

Procurement at Minimum Support Price will stop

What will be the future of government electronic trading portal like e-NAM

DOUBTS

THE FARMERS' PRODUCE TRADE AND COMMERCE (PROMOTION AND FACILITATION) BILL, 2020

Procurement at Minimum Support Price will continue, farmers can sell their produce at MSP rates, the MSP for Rabi season will be announced next week

Trading in farm produce will increase on electronic platforms. It will result in greater transparency and time saving

CLARIFICATION

Mandis will not stop functioning, trading will continue here as before. Under the new system, farmers will have the option to sell their produce at other places in addition to the mandis

The e-NAM trading system will also continue in the mandis

Case Commentaries

Unwinding the Crypts: Himesh Bhatia v. Kumar Vivekanand

By *John Paul Alex*[13]

The cryptocurrency regime in India has been gaining momentum over the past few years despite regulatory uncertainty and intense volatility. Reports have suggested that Indians have shifted from investing in gold to cryptocurrencies lately. The Covid-19 pandemic has popularised electronic contracts, which led to the increase in numerous cryptocurrency transactions. Furthermore, due to the lack of regulations in this domain, cybercrimes have substantially skyrocketed. The heavily unregulated cryptocurrency regime poses various transactional threats as it gains traction. Amid the chaos, the Indian judiciary, on multiple occasions, has taken a positive stance concerning virtual currency transactions.

In the case of **Hitesh Bhatia v. Kumar Vivekanand**, the Delhi Tiz Hazari Courts made extensive remarks about cryptocurrency transactions. Various laws prevalent in the Indian legal system were referred to in adjudging the issue at hand.

BACKGROUND

In a **Circular (2018)**, the RBI forewarned the public about the perils of virtual currency dealings and gave orders to the banks and other financial institutions to stop facilitating virtual currency transactions, which include maintaining bank accounts, trading of cryptocurrencies, considering virtual currencies as collateral, etc.

However, this Circular was rendered unconstitutional by the Apex Court in the case of **Internet and Mobile Association v. Union of India**. In pursuance of this Judgment, the RBI issued a follow-up **Circular** titled 'Customer Due diligence for transactions in virtual currencies,' directing the banks to ignore the previous Circular of 2018 while advising the customers about the vulnerabilities of virtual currency transactions. This new Circular instructed banks and financial institutions to effectuate customer due diligence process based on the standards set by the RBI.

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[13] Ninth Semester, National University of Advanced Legal Studies, Kochi.

Furthermore, the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, which aims to prohibit all private cryptocurrencies and establish a legal framework for introducing an "official digital currency," is kept on hold as various deliberations are still in place.

FACTS

In the case of Hitesh Bhatia, the complainant, a Quantitative Researcher by profession, had entered into various virtual currency transactions with the Accused, which involved the sale and purchase of Bitcoins. The complainant states that he took measures to ensure proof of identity and paid his taxes regularly. The complainant has alleged that he would deposit Bitcoins in the Accused's virtual wallet (Binance) on receiving funds from the Accused in his bank account. Furthermore, the complainant claimed that his bank account froze since the Bitcoin transactions were flagged as illegal. The complainant allegedly questioned the Accused about the source of money, for which the Accused conceded that the payments were a 'scam.' It was contended by the complainant that he was cheated on since the Accused had refused to send back the Bitcoins.

In furtherance, the complainant approached the concerned Police authorities, and allegedly no action was taken. Hence, the complainant applied Section 153 (3) of the Code of Criminal Procedure (Cr.P.C.), praying the Court to order the Police authorities to register an FIR and initiate investigation. The Court directed the Police to draw up an Action-taken report to facilitate the investigation.

ANALYSIS

The Court took note of the financial activity in question. It evaluated the legality of the transaction entered into by the complainant. Relying on the Apex Court's Judgment in Internet and Mobile Association v. Union of India, the Court observed no explicit prohibition on dealings in virtual currency as there were no explicit regulations.

In this regard, the Court's decision is appropriate and tactful as it has shown its disinterest in arbitrarily prohibiting virtual currency transactions. The Court also dealt with constitutional aspects in the instant case. It shed light on the Right to Freedom guaranteed under Article 19(1)(g) of the Indian Constitution.

On recognition of virtual currencies as an acceptable payment option for purchasing goods and services, the Court brought the stakeholders dealing with virtual currencies within the ambit of

RBI, thereby proving it to be a breakthrough in the growth of the virtual currency. This shows the intention of the Court to provide a green signal to virtual currency dealings and hints at establishing a regulatory framework in place to oversee these transactions in the future to come.

The Court acknowledged the threats posed by cryptocurrency transactions. It hence opined that RBI holds power to regulate the activities of such virtual transactions. This reasoning by the Court is in alignment with the Judgment mentioned above by the Supreme Court.

This decision highlights the ambiguity surrounding cryptocurrency dealings and the need for a regulatory system to influence law-making in this area. The Court has adequately justified its reasoning in acknowledging virtual currencies by observing that unless an activity is expressly prohibited by law, it cannot be deemed a reasonable restriction on individuals dealing with virtual currencies. Owing to the lack of regulations, the Court analysed the issue in line with other laws existing in force. It held that virtual currency transactions ought to comply with these laws dealing with money laundering, taxes, foreign exchange, and other regulations set forth by the RBI.

Furthermore, the Court is justified in establishing the responsibility on the intermediary to ensure the authenticity and legitimacy of the individuals and the money involved in such transactions. Holding the intermediary accountable for any illegal activity or malpractice ensures a safe and fool-proof system as the intermediaries can no longer turn a blind eye to suspicious transactions.

In the instant case, Binance, which managed the virtual wallet, was held responsible for deploying several measures to trace the source of money and prevent any other illegal activities.

On putting the intermediaries under the obligation of KYC, the Court brings about legitimacy in cryptocurrency transactions by ascertaining the identities of the individuals involved, the source of funds, and the destination. A commendable stand has been taken by the Court while declaring that the protection of the Right to Freedom guaranteed under Article 19(1)(g) can be sought only when the transactions are made through legitimate intermediaries. This inherently prevents defaulters and fraudsters from carrying out criminal activities in the crypto paradigm.

In adjudging the Accused's culpability, the Court primarily relied on the conversation screenshots (WhatsApp) between two parties. On perusal of the same, the Court opined that it prima facie demonstrates the Accused's knowledge about the source of funds. The Court, however, failed to provide a rationale for placing reliance on the WhatsApp screenshots, which has no evidentiary value, especially in business transactions. The Court has appropriately acknowledged the involvement of the Accused in two cybercrimes but at the same time does not let the complainant off the hook. Reference was made to the fact that the complainant had received money from

different accounts, and a clear contact between the Accused and the complainant was not established. The Court, in this regard, had covered all the issues surrounding the transaction, including the possibility of negligence on behalf of the complainant.

Before making any concluding remarks about the case at hand, the Court had rightly asked for further investigation as the evidence put before the Court was not sufficient to hold the Accused liable. The Court ordered the filing of an FIR. It sought a report regarding the investigation owing to technical intricacies that require further examination. However, the Court failed to place any financial restrictions on the Accused's bank account or virtual wallet.

CONCLUSION

The boom of cryptocurrencies is inevitable despite intense volatility and ambiguity surrounding the regulatory system. In the instant case, the Court has taken a positive stance concerning virtual currency dealings in India, shedding light on the importance of a clear regulatory framework. Despite certain negligible flaws, the Judgment draws a favourable paradigm from cryptocurrency transactions when viewed from a broader perspective. In keeping a tight rein on these transactions, the Court mandated the adherence to the general laws in force which prevents any regulatory or legal loopholes. Furthermore, by holding the intermediaries accountable for any default or malpractice, the Court vouches for establishing a technical system that is fool-proof and easily traceable. By ensuring this, the possibility of funds being used for illegal purposes such as narcotics, terrorism, and cross-border transactions can be curbed.

By giving the order to file an FIR, the Court has set a precedence for cases of similar nature. Owing to the recentness regarding virtual currencies' activities, Police authorities, who initially were reluctant to file an FIR for a case dealing with cryptocurrency transactions, are now given the nod through this order.

A legal framework is the need of the hour to regulate cryptocurrency transactions as numerous global economies have taken several measures in adopting virtual currency dealings. A proper system must be maintained to trace the money in cryptocurrency trades and prevent fraud or embezzlement of funds. As there are no geographical boundaries, regulations and other measures should be put in place to monitor the source and destination of money and the identities of the parties. In conclusion, this Judgment creates room for further deliberations in the arena of crypto-transactions in India.

Tata Iron and Steel Co. Ltd. v State of Bihar

By *Anurag Jain*[14]

FACTS OF THE CASE

The present matter at hand deals with the concept of Territorial Nexus as mentioned under Article 245.

The dispute in the matter is on the opinion of imposition of tax on the annual turnover of the assesse, Tata Iron and Steel Co. Ltd., after the enactment of the Bihar Sales Tax Act (Bihar Act 19 of 1947). The assessee claimed that the goods were delivered outside the province and included in the annual turnover. The Sales Tax Officer rejected the claim and subsequently concurred by the Commissioner of Chotanagpur. The matter was then taken for revision before the Board of Revenue, but they had dismissed it. However, the Board of Revenue had identified specific questions of law to the High Court.

The chronology of events concerning the sale of goods is given below for reference.

After placing an order, the Chief Sales Officer, also termed as 'works order,' forwarded it to Jamshedpur, where the workers could initiate manufacturing. The specifications of the goods regarding the quantity and quality were extensively mentioned in the order. An invoice was generated to pursue the cost incurred during the manufacturing process and, subsequently, delivered to the Controller of Accounts (CoA). The Controller of accounts prepared the railway receipts. Thereon, the goods were loaded and dispatched to the respective delivery point or destinations. However, the assessee was the consignee in the railway receipts, and therefore, paid the freight charges. These railway receipts were sent either to the branch offices of the assessee or its bankers. After the purchaser pays the amount of consideration, the railway receipt is delivered to him.

ISSUES IN THE PRESENT MATTER

The pertinent questions are:

i) Whether the sale is concluded/completed within the State's territorial boundaries or not wherein the goods are produced, found, and manufactured within the State?

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[14] 5th Semester, Symbiosis Law School, Noida.

ii) Is there a territorial nexus between the imposition of tax by the State of Bihar and sale transaction?

RULE TO BE APPLIED

In the Indian context, no authority can go and legislate, authorize or perform any act which is in contravention to the law or is beyond the authority delegated to them. It is derived from Article 245[15] of the Constitution, which enumerates the extent of laws made by Parliament and the Legislature of States. It divides the jurisdiction based on the territory. One crucial aspect of such jurisdiction is the Territorial nexus. Amongst such law-making power, the Parliament is empowered to legislate or enact a law having extra-territorial operation. Hence, an Act of the State Legislature, if it gives extra-territorial operation to its provisions, can successfully be challenged in the court. However, contentions against such operation of law can withstand on the ground of territorial nexus. This means that a law enacted by the State Legislature is not invalid so that a sufficient nexus can be established between the State and the subject matter.

ANALYSIS

It is essential to understand the concept of 'Sale of Goods.' To understand the idea, we will refer to the Bihar Sales Tax Act, 1947 and the Sale of Goods Act, 1930.

Section 2(g)[16] of the Act states that "'***Sale***' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of the contract but does not include a mortgage, hypothecation, charge or pledge."

The ambit of the term 'sale' should be viewed in three ways. *Firstly*, the meaning attached to sale in ordinary parlance; *Secondly*, the transactions of similar nature but referred to with a different term or name and *thirdly*, the transactions that may not be explicitly mentioned but meant to come under the term[17] of sale.

Section 4 of the Indian Sale of Goods Act states, "(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." There may be a contract of sale between one part-owner and another.

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[15] INDIA CONSTI, Article 245 - Extent of laws made by Parliament and by the Legislature of States

[16] Section 2(g), Bihar Sales Tax Act – Definitive clause for the term sale

[17] RBI v. Peerless General Finance and Investment Co. ltd. and Ors., 1987 SCR (2) 1; 1987 AIR 1023

Clause (1) of section 4 of the Act briefly lays down the meaning of the Sale Contract. The essentials are – buyer, seller, goods, and consideration. This contract must further fulfill the requirements of a competent party[18] under the Indian Contract Act.

(2) A contract of sale may be absolute or conditional.

Section 4(2) lays down that the contract should not be vague or ambiguous in its terms, which fails *the consensus* of the parties to the agreement.

We will restrict ourselves to territorial nexus and not delve into the different facets of imposition of tax in this case. We must refer to specific facts to better analyse and understand the intricacy in the present matter.

The State Legislature derives the authority and power to make laws on the subject mentioned above matter through section 100(3)[19] of India, 1935 Act read along with Item No. 48 of List II of/in the 7th Schedule. Imposition of tax on goods is a subject matter, and therefore, it is upon the State to decide the tax rates to goods may be subjected.

Item no. 48 enumerates the topic of taxes on the sale of goods and on advertisements. Section 100(3) exclusively gives the Provincial legislature power and not the federal legislature to make laws on subjects mentioned under the List II of/in the 7th Schedule. This distribution of law-making power between the central and State is based on specific grounds.

Article 1 of the Constitution of India establishes India, that is Bharat, as a 'Union of State.' This means that the country is divided into several states and Union territories. Now, if the responsibility of rule-making is solely given to the Central legislature, it may be overburdened as each State's requirements are different from the other. In continuance to that, the State can ensure the betterment and welfare as they may enact any law that may help them achieve such objectives.

At the same time, article 256[20] of the Constitution casts an obligation on the states to work and function by the law made by Parliament. This ensures that no state can make an arbitrary law and violate the fundamental rights of the citizens.

Now, the words used in Section 100 (3), "….to make laws for province or any part thereof…" are of importance. The section remains silent on the part of the provincial legislator and the extent concerning the law's applicability. Simultaneously, it will be erroneous to presume that the section

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[18] Section 11, ICA, 1872 – Competent Parties
[19] Section 100, Government of India Act, 1935 – Subject Matter of Federal and Provincial Laws
[20] INDIA CONSTI, Art. 256 – Obligation of States and the Union

restricts the legislature to make laws only limited to the territory of the State. Therefore, one should avoid speculation or assumptions while interpreting the words and phrases used in a section.

It should be observed that a sale transaction is a combination of various small transactions of legal nature like the agreement of the sale, passing of title, delivery of goods, etc. However, there may be circumstances where the different stages involved in the contract of sale may not be performed/concluded in one place or State. However, to say that goods might be manufactured in State A, the final consumption and termination are State B.

The purchaser/buyer might live in another state where the actual consumption might take place. However, if the majority of the functions such as finding, accumulating, production, manufacturing is done in another state, it can levy sales tax on such goods.

To establish whether the State of Bihar has the territorial nexus to levy the sales tax, two elements have to be satisfied –

i) the connection must be accurate and not illusory and
ii) the liability sought to be imposed must be pertinent to that connection.

The connection between the State and the subject matter should be genuine and not illusory.[21] This means that tax imposition must originate from valid and legitimate state law, and sufficient territorial nexus with the legislating State shall be established. It is for the court to determine if the test of the sufficiency of nexus is satisfied in each case.

TISCO, Bihar tried to levy production tax on the goods. The State of Bihar claimed that the production house is in Bihar, and thereon, the transportation of goods takes place from Bihar to Madhya Pradesh. Therefore, the majority of the sale agreement is performed in the State of Bihar, and merely the consumption of the property is done outside the State. Thus, the connection is genuine and not merely illusory.

Secondly, the liability sought to impose on such goods is the sales tax which is pertinent to the connection and agreement as the entire dispute is regarding the sales and the tax to be charged or levied on such goods.

It is to be noted that such nexus theory does not authorize the provincial legislature to impose tax but is somewhat indicative of what circumstances an Act of the legislature may impose a tax. The presence of the goods at the date of the agreement for sale in the taxing State; or the production or manufacture of goods in that State; the property wherein eventually passed as a result of the

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[21] *State of A.P.* v *NTPC Ltd.,* (2002) 5 SCC 203; AIR 2002 SC 1895

sale wherever that might have taken place, constituted a sufficient nexus between the taxing State and the sale.

Therefore, the production of goods in Bihar constitutes a sufficient territorial 'nexus' or connection that confers jurisdiction upon the provincial legislature and empowers them to impose a tax on such goods. Therefore, the territorial nexus is established between the subject and the objective sought by the legislation.

The *RMDC* case and *Wallace bros.* The Case acts as a precedent to the present matter.

In *Wallace Bros. and Co. Ltd. v. The Commissioner of Income*[22], a company was registered and incorporated under the Companies Act, which undertook and carried its business in the territory of India. A sleeping partner of the company acted as the representative on behalf of the company to enter into various agreements.

In one such fiscal year, the company earned huge revenue and made enormous profits. The income tax authorities of India sought to impose a tax upon the respondent on such earnings and profits as accounted in the respective financial year.

The respondent had challenged the authority and the basis of such imposition. However, while deciding against the respondent, the Privy Council held that the tax's power is derived from the doctrine of territorial nexus. Furthermore, it was held that the majority of the income earned was from British India, which created sufficient ground to establish a territorial nexus.

Similarly, in *State of Bombay* v. *RMDC*[23], the respondent conducted a prize competition of a crossword puzzle. A prize was given in the form of a reward to the winners of the competition. Anyone who wished to participate had to solve the puzzle published in the newspaper. The newspaper was printed and published in Bangalore as well. The paper was widely circulated in Bombay and Bangalore. The participants were required to submit a form and a small fee, i.e., registration fee.

The state government decided to levy tax on the respondent company for organizing a prize competition in the State. The respondent challenged the matter in the Supreme Court. The question before the court was whether the tax could be levied upon a person, herein the respondent, who resides outside the territorial limits of the State. The Supreme Court held that there exists a sufficient territorial nexus as the competition fees attribute to the revenue earned by

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[22] AIR 1948 PC 118
[23] AIR 1957 SC 699; 1957 SCR 874

the respondent through the competition. Therefore, the State is legitimate in imposing a tax on the respondent for conducting such competition.

CONCLUSION

The High Court held that the State of Bihar was entitled to impose a tax on the goods in the present matter. It further held that the imposition of tax on the goods was within the territorial legislature of the State. Furthermore, it had the authority to legislate on such matters and is not violative of Article 245 of the Constitution of India. Thereby meaning that neither it goes *ultra vires* while performing its function of legislation nor it results in an extra-territorial function.

The court is justified in ruling that the imposition of tax is within the ambit of territorial nexus. The facts and circumstances of the case establish the territorial nexus between the sale and the tax imposing State. The mere fact that the physical transfer of property was done outside the State does not render the State powerless to impose the tax on the goods.

The author concurs with the decision of the High Court to rule in favour of the State of Bihar. The doctrine of territorial nexus does get established in the present scenario. However, it has to be observed on a case-to-case basis. The court rightly observed facts and the establishment of the connection between the object and the facts of the case. Therefore, the author feels this is one of the best judgments that is now being used as precedents in many present subject matters.

Recent Updates.

1. **Supreme Court directs Child Welfare Committees (CWCs) to complete inquiry on orphans within 3 weeks**.

   It has been reported that more than one lakh children have lost either one or both parents struggling during COVID-19. The survival of such children is at stake. This observation has been made by the division bench comprising Justice Nageswara Rao and Justice Aniruddha Bose. This bench directed the Child Welfare Committees of all states to complete inquiries as per the Juvenile Justice Act within three weeks, the report for which has to be filed within four weeks. The children who are not in a need of such assistance (financial) also needs to be identified simultaneously. Such children would not be provided with assistance and only those children in need would be provided so.

   Article 21A entailing free and compulsory education for all children of the age groups 6-14 years would be provided so, by the State along with the basic enmities.

   The States and Union Territories have been directed with the following:

   - Report the number of children who have lost one parent or become orphans since March 2020.
   - Number of children reported and brought forward CWC.
   - Report the children who have received benefits in this regard from the States.
   - Information regarding payment of Rs. 2000 to the needy children under ICPS scheme.

   On May 28, the Union and the States were directed to upload the data of orphan children on "Bal Swaraj" portal, the illegal adopted of such orphans has been directed to be taken care of, by the bench.

2. **Centre directs the Supreme Court to constitute a committee to optimize Case Management System within 3 months**

   The Centre has made remarkable progress in adopting technology in order to streamline monitor and integrate government litigation. It has been previously reported by the bench consisting of Justice D.Y. Chandrachud and Justice M.R. Shah that there has been a gross delay in the settlement of revenue matters. The officers previously reported delay and ignorance on the part of Supreme Court. A committee, in compliance with the Ministry of Finance, Department of Revenue has been constituted that will finalize and operationalize a suitable system within 3

months for effective case management by the government. It consists of various representatives from law, economics and finance department. The bench has also directed the Secretary of the Department of Revenue to regularly monitor the progress made by the committee and provide technical assistance and knowledge, as and when required. This step has been possible because of the GST bifurcation under List I, II and III.

"*It will enable a more business-friendly adjudicatory framework. It will be the government's message to businesses that it only wants tax dues to be paid and not harassing assesses through revenue officials.*" quoted by Justice Chandrachud.

Earlier, the bench had noted the collaboration of National Informatics Centre (NIC) with the Ministry of Finance to bring litigation data in the ambit of LIMBS platform (Legal Information Management and Briefing System).

3. WhatsApp's plea challenging traceability clause under IT Rules, 2021: Delhi HC

Case Name: *WhatsApp LLC v. Union of India*

The Delhi High Court has filed a plea, challenging the traceability clause under Rule 4(2) of the Information Technology Act, 2021, as violative of the right of privacy which was enshrined under *KS Puttuswamy v. Union of India*[1]. The bench comprising Chief Justice DN Patel and Justice Jyoti Singh has scheduled hearing of the matter on 22nd October. The above clause will put professionals at risk including journalists who could be at the risk of retaliation for investigating unpopular issues or for criticizing politicians and policies who could be reluctant to share confidential information. This would encourage the breakage of end- to- end encryption on its messaging service and defeat the opportunity to identify the originator of the message.

This law does not pass-through Article 21 and is arbitrary of Art 14, 19 along with sec 79 and 69 (A) of the IT Act.

4. Formulation of rules to curb Lawyer's strikes and Court's Boycotts

Case name: *District Bar Association Dehradun v. Ishwar Shandilya & Ors.*

The Bar Council of India has informed the Supreme Court that it is proposing to frame rules to curb lawyers' strikes and court's boycott and take reasonable

[1] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1

action against those who promote such strikes through social media. Appropriate punishment will be granted to the members of bar association who go on strike without proper justification. This decision has been bought forth by Advocate Manan Kumar Mishra, who is the chairman of BCI.

5. **Establishment of new courts in States where more than 100 cases are pending**

Taking into account the long pendency of criminal cases against sitting and former MPs/MLAs, Supreme Court has directed the establishment of more CBI/ Special Courts to deal with such matters.

It has been pointed out that States like Madhya Pradesh are in need of such courts to prevent travesty of justice. This has highlighted by the bench consisting of CJI NV Ramana, Justice DY Chandrachud and Justice Surya Kant. It would not be possible for one/two courts in a state to expedite such matters in terms of Sec 309 of CrPC, therefore, establishment of multiple courts in a state has been recommended. The states have been directed to provide necessary infrastructural base to facilitate the establishment of additional CBI/ Special Courts, as and when required. This direction was issued while hearing the matter of Ashwini Kumar Upadhyaya v. Union of India. The bench commented that there should be continuous judicial supervision, vigilance and monitoring by the High Courts. High Courts have the responsibility to setup adequate courts and meticulously follow the guidelines issued by the top-courts.

As per the CBI report, India has 121 pending cases against MPs/ Ex- MLAs along with 112 actual cases. 37 are still at investigation stage with the oldest pending case being registered in 2013. Data reveals that in certain cases, chargesheet has been filed but appearance of the accused, framing of charges or prosecution in still pending. The establishment of new courts will be taken charge of, by the CBI. The Apex court highlighted the ignorance and delay which can be seen on the part of investigative agencies like CBI, ED and NIA which needs to be urgently addressed.

6. **Appointment of nine Supreme Court Judges including 3 women**

As per the recommendations of the Supreme Court collegium, President has approved the appointment of the following judges:

Mr. Justice A.S. Oka, Chief Justice, Karnataka High Court

Mr. Justice Vikram Nath, Chief Justice, Gujarat High Court

Mr. Justice J.K. Maheshwari, Chief Justice, Sikkim High Court

Ms. Justice Hima Kohli, Chief Justice, Telangana High Court

Mrs. Justice B.V. Nagarathna, Judge, Karnataka High Court

Mr. Justice C.T. Ravikumar, Judge, Kerala High Court

Mr. Justice M.M. Sundresh, Judge, Madras High Court

Ms. Bela Trivedi, Judge, Gujarat High Court

Mr. P.S. Narasimha, Senior Advocate

As per seniority, Justice BV Nagarathna is all set to become the first woman Chief Justice of India in 2027. The appointment of new judges has been made after nearly two years, in the Supreme Court. Now, the strength of court will be 33 with one vacancy.

7. **Permission of District Magistrate not needed for conversion by inter-faith marriage**

As per a recent report, Gujarat High Court has refused to rectify its previous order staying Section 5 of the Gujarat Freedom of Religion Act stating that they do not find any problematic content in the order.

The bench comprising of Chief Justice Vikram Nath and Justice Biren Vaishnav, it was argued that Section 5 of the Act is not concerned with marriage per se. It is only related to seeking permission of the District Magistrate, by a person who wishes for his religion to be converted and therefore, it must not be nullified/changed.

"*If somebody wants to get married (inter-religious), the presumption is that it is unlawful unless permission is taken under Section 5. Since the Court has stayed Section 5 only in relation to marriage to marriage solemnized between consenting adults, the provision will not be deemed to be stayed for individual conversions.*"

Now, marriage comes under the ambit of Section 3, so permission under Section 5 would also be required for the same. Section 5 has been stayed with respect to marriages only and not as a whole. The court concluded by saying that they do not find any reason to make any changes in the order passed.

8. **Commencement of physical hearings by Supreme Court with hybrid mode option from September 1**

As per a recently published notification by the Supreme Court, lawyers have the option to choose between physical mode

and video/tele-conferencing mode to carry out the proceedings. The court will commence physical hearing in hybrid option from September 1, 2021. The Secretary General of the Court has published a Standard Operating Procedure (SOP) for the same. The physical hearings will be limited to final/regular hearings on non-miscellaneous days i.e. Tuesdays, Wednesdays and Thursdays for the time being. The advocates have been advised to submit their preferences within 24 hours next day after publication of the weekly list of the final hearing/ regular matters. If physical hearing has been opted by the advocate, video/ tele-conferencing hearing will not be facilitated.

9. **Bombay High Court dismisses plea which alleged ex Maharashtra CM Devendra Fadnavis used Pegasus to obtain courts documents**

The Nagpur Bench of Bombay High Court dismissed a petition filed by a Nagpur Lawyer seeking investigation into his complaint that former Chief Minister of Maharashtra Devendra Fadnavis was associated of using the software developed by Israel Company: Pegasus.

Case Name: *Satish Uke v. State of Maharashtra & Ors.*

A complaint was filed by the petitioner against Fadnavis alleging that he had stolen digital copies of a criminal writ petition from his mobile phone using Pegasus software. These applications were used for filing an intervention application by the associates. The Bench comprising of VM Deshpande and Amit B. Borkar suggested lack of need to hold the existing complaint by the petitioner and noted that the petitioner had sought reliefs against the respondents for the same incident.

10. **Balasubramanian v. M. Arockiasamy (D) through LRS- Injunction granted in a matter of property dispute.**[2]

A Bench consisting of N. V. Ramana, S.A. Boppana, and Hrishikesh Roy heard and decided a matter put forth which involved applicability of Section 100 of the CPC, for which they upheld the judgment of the Madras High Court. The appeal was filed against a judgment delivered by the Madras HC seeking perpetual injuction to forbid the other party from disallowing him to enjoy the property he had been paying "kist" for since the past four decades. After filing a first appeal under Section 96 of the CPC,

[2] Balasubramanian v. M. Arockiasamy, 2021 SCC OnLine SC 655

the defendant filed a second appeal, during the proceedings of which a substantial of law was examined by the HC- "whether the suit without the prayer for declaration is maintainable when especially the title of the plaintiff is disputed." The High Court observed the contentions of the parties and came to a conclusion stating that the question of law did carry substance, thus setting aside the judgment of the first appellate court. Unhappy with this decision, the now plaintiff went on to carry the case to the Apex Court, using Section 100 to assert that the High Court had gone beyond its judicial limits to decide the case, and that it should not have interfered with the reappreciation of evidence which had already been taken care of by the first appellant court.

Lastly, the Apex Court found "the findings by the trial court and the first appellate court were divergent. The trial court concluded that the *kist* receipts would not establish plaintiff's possession, whereas the first appellate court in fact placed heavy reliance solely on the *kist* receipts."

The Supreme Court declared the plaintiff's possession of the suit property to be unestablished, and that the first appellate court misguided itself. In the end, the Supreme Court found the judgment of the High Court to be in consonance with the factual situation of the matter, resulting in dismissal of the appeal.

11. **Sanjay Ramdas Patil v. Sanjay & Ors.- Judgment delivered by Aurangabad Bench of Bombay HC set aside by the Supreme Court over violation of Policy of Rotation:-**[3]

The Apex Court recently commented on the possibility of repetition of reservations in OBC category for the Mayor's post, specifically for the Dhule Corporation, due to the large number of municipal corporations in the state of Maharashtra, which cannot be said to be violative of the rotation policy as prescribed the laws in Maharashtra. Here, Article 243T of the Constitution was referred by Justices L Nageswara Rao and BR Gavai, which encapsulates stipulations of reservation of seats in municipal bodies. Along with this Article, Section 19 of the Maharashtra Municipal Corporations Act, 1949 and Rule 3 of the Maharashtra Municipal Corporations

[3] Sanjay Ramdas Patil v. Sanjay & Ors., (2021) SCC OnLine SC 650

(Reservation of Offices of Mayors) Rule, 2006.

The Court found that the High Court's reasoning of a corporation not being able to have same reservation twice till the time all categories have been allotted was unjustified. It was advised that the Court must choose an interpretation that makes a statute efficient, and not kill the reason behind its enactment.

12. **Delhi High Court allows Indian couple living in US to register marriage in Delhi through digital medium.**

The couple had sought a direction to the Sub-Divisional Magistrate (SDM) concerned in New Delhi to register their marriage in accordance with the provisions of the Delhi (Compulsory Registration of Marriage) Order, 2014 without insisting on their physical appearance before him.

The Court held that the term "personal appearance" in Clause 4 of the Registration Order had to be read to include presence secured through video-conference.

"Any other interpretation, would not only frustrate the very purpose of this beneficial legislation, but it would also undermine the use of this important and easily accessible tool of video conferencing," it pointed out. The Court, therefore, endorsed use of video conference to register the marriage of an Indian couple living in the US, seeking registration of their marriage in Delhi.

13. **Kerala High Court senior advocate designation rules challenged before Supreme Court**

Kerala based lawyer, Sohan KV has approached the Supreme Court challenging the High Court of Kerala (Designation of Senior Advocates) Rules, 2018 which govern designation of Senior Advocates in the Kerala High Court. The plea, which has been filed as an application in the Indira Jaising case, said that the Rules run contrary to the judgment of top court with respect to the number of votes a candidate should get at the full court meeting for him/ her to be designated.

As per the judgment, a simple majority is sufficient but the Kerala High Court Rules mandate two-third majority, the plea drawn by advocate Bijo Mathew Joy and filed through advocate Seshatalpa Sai Bandaru said.

14. **Centre clears appointment of six judicial members to Armed Forces Tribunal**

These appointments have been made after the top court came down heavily on Centre for delay in filling up the vacancies. A three-judge Bench headed by Chief Justice of India NV Ramana had on September 6, pulled up the

government for its inaction in filling up vacancies in tribunals and also berated it for enacting the Tribunals Reforms Act, 2021 in violation of its judgments.

The six members appointed are:

1. Justice Bala Krishna Narayana;
2. Justice Shashi Kant Gupta;
3. Justice Rajiv Narain Raina;
4. Justice K Harilal;
5. Justice Dharam Chand Chaudhary;
6. Justice Anjana Mishra

In line with the Tribunal Reforms Act, 2021, this appointment is for a period of four years, or till the members attain the age of 67 years, whichever is earlier.

15. Centre issues guidelines for COVID Death Certificates following Supreme Court's Directions[4]

The directions were issued by a bench comprising Justices Ashok Bhushan and MR Shah in the judgment delivered on June 30 in the cases Gaurav Kumar Bansal vs Union of India and Reepak Kansal vs Union of India and Others. The bench had made it clear that a death certificate issued in respect of a COVID fatality must clearly specify the cause of death as COVID itself. Also, if a person has died due to any other complications or disease due to COVID, then also the death certificate should specifically mention the cause of death as COVID.

Government of India has told the Supreme Court that it has framed guidelines to simplify the process of the issuance of COVID-19 death certificate in compliance with the directions in the judgment passed on June 30. These guidelines specify:

- What are COVID-19 cases?
- What will not be considered as COVID deaths?
- COVID deaths
- Procedure for redressal of grievances regarding death certificates

16. Plea to declare virtual court hearing as Fundamental Right: Supreme Court issues notice to BCI, SCBA & 4 HCs[5]

The Supreme Court on 6th September issued notice to the Bar Council of India, Supreme Court Bar Association and four High Courts on a writ petition seeking a declaration that virtual court hearing is a fundamental right which sought for the retention of the hybrid options for physical and virtual hearings in courts saying that it enhanced the right to access justice.

The High Courts of Uttarakhand, Bombay, Madhya Pradesh and Kerala are arrayed as respondents in the petition. The bench also impleaded the BCI and

[4] Reepak Kansal vs Union of India and Ors, (2021) SCC OnLine SC 443.

[5] All India Association of Jurists vs. Uttaranchal High Court WP (C) No. 941 of 2021

the SCBA, observing that it wanted to know their views on the matter. The petition was filed by an organization of lawyers called "All India Association of Jurists" and legal reporter Sparsh Upadhyay, challenging the recent decision of the Uttarakhand High Court to revert to complete physical hearings, without hybrid option.

17. **Centre's decision to allow early administration of Covishield vaccine before 84 days to some classes of people discriminatory**

The Kerala High Court allowed the petition filed by two companies seeking to administer the second dose of 'Covishield' vaccine to its workers before completion of the 84 day-gap. Justice P.B. Suresh Kumar directed the Department of Health and Family Welfare to make necessary provisions forthwith in the CoWIN portal, so as to enable scheduling of 2nd dose of the Covishield vaccine after 4 weeks of the first dose.

The Court had earlier inquired if this gap was necessary and if it was related to the efficacy of the vaccine, or if it was extended due to the non-availability of the vaccines in the country. To this, the respondent had replied that the prescribed 84 days between two doses of Covishield vaccine was based on a technical opinion recommended by the National Expert Group on Vaccine Administration for COVID-19 (NEGVAC) for better protection from the Covid-19 virus.

The Court noted that in the statement filed by the Centre, it was admitted that the immunity provided by the second dose of Covishield vaccine with a time interval of less than 12-16 weeks would be better than partial vaccination, namely single dose. The Court noted that vaccination was made voluntary and not mandatory in the country considering one's right of bodily autonomy. In that context, the Bench observed that the requirement to administer two doses of the vaccine and the interval between the two doses for better protection from infection can only be considered as advisory.

It was further observed by the Court that if the Government can permit persons intending to travel abroad to exercise a choice between early protection and better protection from Covid- 19 infection, there is absolutely no reason why the same privilege shall not be extended to others who want early protection in connection with their employment, education, etc.

18. **Amazon- Future Dispute: Supreme Court stays enforcement proceedings in Delhi High Court**[6]

    The Supreme Court on Thursday stayed the proceedings instituted by global e-commerce giant Amazon for the enforcement of the Emergency Award passed in its favor by a Singapore-based arbitrator which halted the merger deal between Future Retail Limited and Reliance group. The Court also asked all authorities including the NCLAT, CCI and the SEBI to not pass final orders for four weeks in relation to the Future-Reliance deal.

    The bench stated that it was passing the order taking into consideration the fact that the Future group has approached the Singapore International Arbitration Centre to vacate the interim order passed by the Emergency Arbitrator and arguments have been concluded in that.

19. **NEET- PG 2021: Supreme Court dismisses plea for option to change exam center**[7]

    The Supreme Court on Thursday dismissed a writ petition filed by doctors seeking directions to allow change of exam center option and to postpone the conduct of NEET PG 2021 till National Board of Examination allows such option.

    bench of Justices UU Lalit, S Ravindra Bhat and Bela M Trivedi dismissed the petition after observing that the COVID situation is improving in the country and there are few travel restrictions in force.

20. **Centre will introduce new law on mediation: Law Minister Kiren Rijiju**

    The Central government is set to introduce a new bill on mediation in the upcoming winter session of the parliament, Union Law Minister Kiren Rijiju said on 12th September, with the government aiming to make India an "arbitration hub".

21. **Danane Shweta Sunil and Ors v. Union of India**

    The division bench of Justices Nagarathna and DY Chnadrachud while hearing a miscellaneous application in relation to management of funds for children, recognised the parental loss of children in the state. The state of Maharashtra had planned a budget of Rs.25 crores to spend for the welfare of children who had lost their parents due to the Covid-19 pandemic.[8] The counsel appearing for the state stated the figures of children had aptly been added to the

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[6] Amazon.com NV Investment Holdings LLC vs Future Retail Limited and Ors, (2021) SCC OnLine SC 557.

[7] Poulami Mondal and Others vs All India Institute of Medical Sciences and Ors, (2021) SCC OnLine SC 424.

[8] Anonymous, *Supreme Court Favours ₹ 25 Crore Funds For Maharashtra Covid Orphans,* NDTV (Sept.20, 2021).

website of National Commission for Protection of Child Rights (NCPCR) under the Bal Sangopan Yojana. While the court recognised the efforts of the state to aid the children, it also called for verification of aforesaid data and asked for a clear statement laying out the clear plans of allocating the money to the children. Only then would the court disburse the money that was lying in the registry and asked the secretary, Women and Child Development of the State of Maharashtra to file an affidavit consisting of a solid "concrete plan" within three weeks.

22. **Jarnail Singh v. Lachhmi Narain Gupta and other connected matters, SLP(c) No.30621/2011**

While hearing a total of 133 petitions together, the apex court has set to clear the doubts and loopholes in relation to reservation in promotion.

In the case of M.Nagaraj vs. Union of India in 2006[9], it was held that quantifiable data was necessary to clearly show that "backwardness" of the people in the SC/ST community in order for them to get a reservation seat in case of a promotion. This part of the judgment was overruled in 2018 by a five-judge bench and the apex court has now decided not to reconsider the issues that have already been discussed and settled in relation to the Nagraj case.[10]

Senior Advocate, Indra Jaising highlighted how the high courts were framing orders in interference to state guidelines in relation to reservation and while some courts allow for reservation, one court has issued polar opposite orders calling for status quo promotion. With conflicting high court judgements, the court recognised that states need immediate attention in relation to cases pertaining to reservation in promotion. Many jobs were lying vacant due to this unresolved issue. While the court clearly stated that there is no need to reopen interpretation of article 16(4)[11] of the constitution that deals with provision of reservation for the backward class, the court called for respective states to identify the issues they had with reservation policy and to present them to the court.

23. **Justice(Retired) Ashok Iqbal Singh Cheema v. Union of India | WP(c) No.1027/2021**

The Supreme Court goes into details of the Tribunal Reforms Act, 2021 which

[9] Nagaraj & Ors v. Union of India & Ors, (2006) 8 SCC 212.

[10] Legal Correspondent, *Quota for SCs, STs in job promotion | Don't want to reopen order, says Supreme Court*, The Hindu (Sept.20, 2021)

[11] INDIA CONST. art. 16, § 3.

has become a source of contention between the union government and the court. The aggrieved party Justice (Retired) Ashok Iqbal Singh Cheema had sought redressal for his retirement as acting chairperson of the National Company Law Appellate Tribunal, which was done prematurely by the central government. The government had already appointed another person as the acting chairperson and the bench has stated that this sudden retirement can cause an "awkward" situation wherein Mr. Cheema has reserved judgment in multiple cases, and for that he needed to exercise his powers as the acting chairperson.

The attorney general K.K. Venugopal later acknowledged the issues posed by the bench and agreed to reinstate Mr. Cheema as the acting chairperson till his retirement day on 20th September. The court had circumvented around the violation of the independence of the judiciary across the country by the intervention of a government order to reduce the tenure of a chairperson. While his appointment was done under the Tribunal Reforms Act,2017 the newly amended Tribunal Reforms Act,2021 lays out a tenure of 4 years for the chairperson and other members.[12] Certain provisions of the Tribunal Ordinance were already struck down by the Supreme court earlier and currently there is a plea before the court, challenging the constitutional validity of the Tribunal Reforms Act, 2021.

24. Rasoolshan A v. The Additional Chief Secretary & Ors.

The Kerala government had recently announced that grade 11 exams were to be held offline in the state. The petition was challenging the order on the grounds that the safety of students was at risk considering the increase in Covid-19 cases in the state. The bench found the petitioners arguments unsatisfactory and stated that they were satisfied with the response of the state in relation to taking appropriate safety measures.[13] While the apex court had earlier allowed for the stay of examination on a judge delivered on September 3rd, the current bench recognised that the data in relation to the third wave of the pandemic has altered and it would not occur in September. The bench recognised that several examinations including lakhs of students were held successfully following protocol and that it was imperative to conduct

[12] Kirti Meena*, Sandli Pawar, India's Tribunals Reforms Act: A Challenge to the Separation of Powers*, Jurist (Sept.26, 2021).

[13] Legal Correspondent, *SC not to intervene in Kerala's plans to hold Plus One examinations offline*, The Hindu (Sept.26, 2021).

grade 11 exams and the mark is carried forward to 12th grade.

25. **George Mangalapilly vs. State of Madhya Pradesh LL 2021 SC 473**

The Supreme Court quashed criminal case against a man, George Mangalapilly who was accused of forcibly converting a person, Dharmendar Dohar to Christianity. The testimony of the witness in this case was that he had not been forcibly converted by the accused nor had he been in contact with him.[14] He was charged under Sections 3 and 4 of the M.P. Freedom of Religion Act, 1968. However, the court in this case with regards to the facts and circumstances of the case, placed importance on the testimony of the man who was said to be forcibly converted. However, the witness himself had stated that he had not filed any report against the accused that in these "peculiar circumstances" the accused is allowed relief and the proceedings charging him under S 3 and 4 of the M.P. Freedom of Religion Act is quashed.

26. **Ranjit Rajbanshi vs The state of West Bengal and others[15]**

The perpetrator in this instance was 22 years old, while the victim was 16 and a half years old. The Trial Court found the defendant guilty under Section 376(1) of the Indian Penal Code and Section 4 of the POCSO Act. The accused emphasized in his appeal to the High Court that the victim had confessed her previous relationship with him. The state argued that the victim was a minor at the time of the crime, and that even if the child had agreed to the crime, it made no difference.

The court interpreted that while interpreting the term "child" appropriately, the age, maturity, and other factors become essential in deciding whether or not a case of penetrative sexual assault should be pursued. According to the definition of "child" under Section 2(d) of the Act, even a person who is 17 years and 364 days old would qualify as a child, but her maturity would be no different from that of another person who was only one day older than her, that is, 18 years old, the Court stated. The court further mentioned that "*The expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused."* The court stated that based on the facts presented, no unilateral forced act of penetration on the part of the accused was proven in this case. In the present case, however, a prior

[14] Jesse Jacob, *India: Supreme Court Turns Down Forcible Conversion Case,* The Law Reporters (Sept.27, 2021).

[15] Ranjit Rajbanshi v. State of West Bengal and Others, (2021) SCC OnLine Cal 2470.

relationship between the two fairly adult individuals has been accepted, leading to the claimed event, it stated. The court also noted that the lawsuit was filed four days later as a result of the victim's reluctance to marry him. Although the issue of consent does not arise in the case of a juvenile, it must be proven that the alleged offence was committed against the victim's will in order to be prosecuted under Section 376(1) of the IPC. When read together, Section 376 of the IPC and Section 3 of the POCSO Act should be understood similarly, and the accused should not be held accountable for a consensual mutual act of sexual union.

"If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organ of *different genders, Justice Sabyasachi Bhattacharyya observed."*

According to the Court, the victim's psychology, maturity, and past behaviour in relation to the accused are also important in convicting a person for penetrative sexual assault. It went on to say that the POCSO Act's provisions should be given a proper interpretation in order to safeguard children and not be used as an instrument of abuse to force someone to marry someone else.

The Court further noted that both the accused and the victim are currently married to strangers unrelated to the case. Additionally, as a result, the Court should exercise extreme caution in imposing a stigma on either the accused or the victim.

27. Youth Bar Association vs Union of India[16]

Last Monday, the Rajasthan State Assembly passed the Rajasthan Compulsory Registration of Marriages (Amendment) Bill 2021 to modify a 2009 Act [Rajasthan Compulsory Registration of Marriages Act], which requires marriages, including child marriages, to be registered. Parties must submit a Memorandum for Registration of Marriage to the Registrar within whose jurisdiction the marriage is solemnized, according to Section 8 of the 2009 Act. Until recently, the regulation stipulated that if the parties (bride or groom) were under the age of 21, their parents or guardians would have to submit the memorandum. However, if the amendment bill becomes law, it will be the responsibility of the bride's or groom's parents or guardians to submit the memorandum if the bride is under the age of 18 and/or the groom is under the age of 21.

[16] Youth Bar Association of India v. Union of India, 2019 SCC OnLine Utt 1769.

In the Supreme Court, a Public Interest Litigation (PIL) petition has been filed by Youth Bar Association of India contesting the constitutional validity of Section 8 of the aforementioned Bill inasmuch as it allows for the registration of child marriages. It was also claimed that, while the petitioner is not opposed to marriage registration in general, allowing the registration of "child marriages" would create a "threatening condition" and may promote child abuse. *"Our country is a 'welfare state' and the Governments owes an obligation to work for the welfare of the nation. Children must be the paramount consideration, who happens to be the resources of a developing nation"*, it was further argued.

According to the appeal, the Rajasthan Government aims to enable child marriage by providing it a back door access, which is otherwise illegal and inadmissible under law, as stated in the Statement of Objects and Reasons for changing Section 8. In addition, the petition claimed that Section 8 of the Bill "protects the solemnization of the marriages of minors who have not reached marriageable age." It was also claimed that such a Bill would undermine the objective of the 2006 "Prohibition of Child Marriage Act," which was designed to prevent such marriages.

The appeal argued that marriage registration would fall under the definition of "vital statics" in Schedule VII List III Entry 30 of the Constitution of India, raising questions on the legislative authority to pass such a Bill. As a result, the State Government lacks legislative authority over the crucial subject of mandatory marriage registration, according to the argument.

28. Jitendra Mann alias Gogoi murder in Rohini court

After a horrifying incidence of gunfire in a courtroom in Delhi's Rohini Court on Friday, where imprisoned criminal Jitendra Maan alias Gogoi was murdered, the security arrangements at the district courts have come into sharp attention. Two assailants of a rival gang who had attacked Gogoi and were acting as attorneys were also murdered when police fired shots in reprisal, according to media accounts. According to witnesses, the judge and court personnel were there when the horrible occurrence occurred. During the gunfire, images of litigants and attorneys running for safety have surfaced.

The current appeal is based on observed occurrences and data that demonstrate that the situation surrounding safety and security in Delhi's district courts is handled considerably more carelessly than in the High Courts and Supreme

Court. The Delhi High Court administration informed the High Court's judicial side in September last year that there was an urgent need to increase police presence at the Rohini Court complex due to inadequate security precautions. The affidavit by the High Court Administration was filed in response to a Public Interest Litigation (PIL) filed by lawyer Kunwar Gangesh Singh in July 2019 seeking directions to improve the security systems of various district courts across Delhi in order to reduce the increasing number of shootouts reported in recent months. In the High Court, the petition is still undergoing adjudication. In addition, the petitioner stated that there is an imbalance in the ratio of police officers to the large number of visitors, creating a significant security concern. It was also claimed that district courts in Delhi had turned into a "playground" where defendants may interact freely with their peers and family members while in court. The petitioner further claimed that such frequent shootings and murders within courthouses not only make the public fearful of visiting the court to seek justice, but also have a negative impact on the judicial system's functioning, resulting in an increase in the number of outstanding cases. A request had been made to the Delhi government for raising the number of CCTV cameras in the Rohini Court complex, which are 'grossly insufficient,' according to the affidavit submitted by Joint Registrar (Management & Co-Ordination Cell (Building Maintenance Committee, District Courts). The affidavit further said that "in addition to Delhi Police officers, 33 private security men and one supervisor have been engaged to further reinforce the security of the Court Complex."

The Supreme Court has taken a suo motu case on to address the problem of judge and court security.[17]

The aforementioned incident makes it very clear that one just need to dress as a lawyer to enter the court room. In fact, in most of the district courts disguising as a lawyer is also not necessary to enter the court, any civilian can visit the court without undergoing any security check. The incident gives a reality check about the intensity of risk the lives of lawyers, judges, interns and other civilians possess inside a court. Such a kind of lacunae in the security system could one day lead to terrorist attack in courtroom.

There should be proper devices and functioning metal detectors in courts at all levels in order to keep a check on the

[17] Aaratrika Bhaumik, *Delhi High Court Admin. had raised concerns about security in Rohini Court a year ago,* LIVE LAW, (Sep. 27, 2021).

weapons. There should also be a consideration of hearing the statements of dangerous or most wanted criminals virtually and not bringing them physically to court.

29. **POSH Act: Guidelines issued to protect identities of parties involved** (P v. A & Ors)

The Bombay High Court has released a set of guidelines to be followed in cases involving Sexual Harassment of Women at the Workplace. The rules deal with the format of filing cases under the POSH Act, conducting hearings, access of the public to the proceedings, and directions to the certified copy department. The key takeaways from the guidelines are as follows:

- Names of the parties will not be disclosed in the order sheet. The cases must be referred to as A v. B, P v. D.
- There shall be no mention of any Personally Identifiable Information (PII) such as phone numbers, email ids, addresses, etc.
- The documentation of all such cases will be kept confidential and shall also be not uploaded on any official High Court website.
- All judgements must be delivered in private, i.e., no orders can be passed in an open court.
- Media houses are also banned from reporting any proceedings and judgements unless permission is given.
- Only anonymised versions of any judgement or order can be published for public access.
- Failure to abide by the confidentiality guidelines may result in contempt of court.

Justice Patel also stated that since there are no established guidelines as of now, the introduced guidelines were a "minimum requirement" and are subject to modifications or revisions as and when required.

30. **Breastfeeding a child[18] is an important attribute of motherhood and is protected under Article 21.**

The Karnataka High Court on 29th September 2021 stated that breastfeeding needs to be recognised as an inalienable right of the lactating mother under Article 21 of the Indian constitution; similarly, the right of the suckling infant for being breastfed too, has to be

[18] Smt Husna Banu v. State Of Karnataka, WP No. 16729 of 2021(GM Police) c/w WP No. 15044 of 2021(GM Police).

assimilated with the mother's right; arguably, it is a case of concurrent rights; this important attribute of motherhood is protected under the umbrella of Fundamental Rights guaranteed under Article 21 of the Constitution of India. The court made this observation in a case where the biological mother of a child, who was stolen after birth from the maternity home, had approached the court seeking the return of the child from the foster mother. The said order also stated that the claim of the genetic mother should be given a priority over the foster mother, subject to all just exceptions, into which the case of the foster mother is not shown to fall; this augur well with reason, with the law and with justice. The court also noted that it is not possible to apply thumb rules in cases like these as the subject matter involved is very complex. The advocate for the foster mother argued that since his client does not bear any child of her own, the custody of the child in the case should remain with her only. However, the court disregarded the argument stating that children cannot be used as a chattel for being apportioned between their genetic mother and a stranger, based on their numerical abundance.

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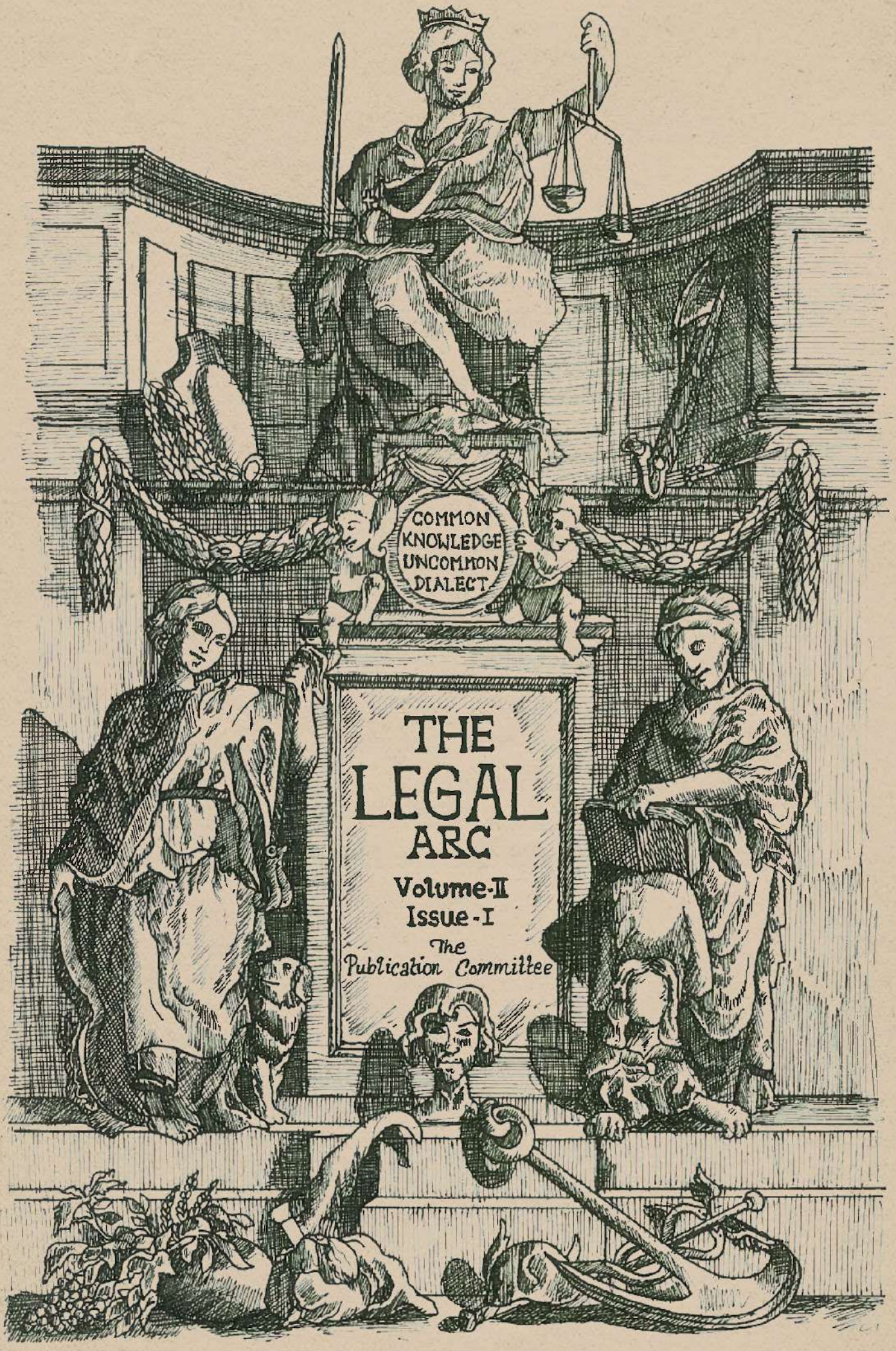

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